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2542  
No. 11988

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United States  
Court of Appeals  
for the Ninth Circuit

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SAM CATRINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

**FILED**

SEP 23 1948

PAUL P. O'BRIEN,   
CLERK





No. 11988

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United States  
**Court of Appeals**  
for the Ninth Circuit

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SAM CATRINO,

Appellant,

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for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

GEORGE F. HIGGINS,  
Missoula, Montana, and

JAMES D. TAYLOR,  
Hamilton, Montana.  
Attorneys for Appellant and Defendant.

JOHN B. TANSIL,  
United States Attorney, Billings, Montana.

HARLOW PEASE,  
Asst. United States Attorney, Butte, Montana,  
and

EMMETT C. ANGLAND,  
Asst. United States Attorney, Butte, Montana,  
Attorneys for Appellee and Plaintiff. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
for the District of Montana.

No. 6784

United States of America, Plaintiff, vs. Sam  
Catrino, et al., Defendants.

Be It Remembered, that on March 13, 1948, an  
Indictment was duly returned and filed herein in  
the words and figures following, to-wit:

In the District Court of the United States  
District of Montana, Missoula Division

No. 6784

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM CATRINO, JOHN A. REINHARD, and  
JOHN DOE (whose true name is unknown, but  
who is described as being in the company of  
John A. Reinhard in the transaction hereinafter  
narrated, and who is a white man aged about  
25 years, about 5 feet ten inches in height and  
weight about 145 pounds, and wearing a big cow-  
boy hat and range clothing at the time men-  
tioned).

Defendants.



## INDICTMENT

The Grand Jury charges:

## COUNT ONE

(Subornation of Perjury) (Title 18, 232)

The above named defendants, Sam Catrino, and John A. Reinhard, on or about March 13, 1946, at Missoula, in the District of Montana, and within the jurisdiction of this court, did unlawfully, corruptly and feloniously, procure one James B. Rennaker, to commit perjury as follows: The said defendants, Sam Catrino, and John A. Reinhard, were charged in the District Court of the United States for the District of Montana, with a crime against the sovereignty of the United States, to wit: violation of Section 241 of Title 25, U.S.C.A., viz., an unlawful sale of liquor to an Indian ward of the government, alleged to have been committed on October 20, 1945, at a saloon known as the Brunswick Bar in Missoula, Montana; said cause came on for trial on March 13, 1946; on and prior to [3] said date, the said defendants, Sam Catrino and John A. Reinhard, solicited, procured and caused the said James Rennaker to appear as a witness in the said United States District Court on March 13, 1946, upon the trial of said cause and to be by the Clerk of said Court sworn as a witness in said cause and to testify that he, the said James B. Rennaker, on the late evening of October 20, 1945, was in the said Brunswick Bar and there saw a Mexican person buy a quantity of wine at the bar of said saloon,

and deliver the same to one Pat A. Pierre; that said testimony so given was false and known by the Defendants Sam Catrino and John A. Reinhard and by the said James B. Rennaker, to be false; that in truth and in fact, said James B. Rennaker was not in said place, nor in the City of Missoula at the time referred to, to wit, the late evening of October 20, 1945, but was in or near the City of Butte, Montana, and that in truth and in fact, he did not see any person sell any wine or other liquor to the Indian ward, Pat A. Pierre, on October 20, 1945. [4]

#### COUNT TWO

(Obstruction of Justice: 18 USC 241)

The above-named defendants Sam Catrino and John A. Reinhard on or about March 13, 1946, at Missoula, Montana, in the District of Montana and within the jurisdiction of this Court, did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, then in session and engaged in the trial of a cause entitled, "United States of America vs. Sam Catrino and John A. Reinhard," wherein said Defendants were charged with and being tried for a violation of section 241 of Title 25 of the United States Code, to wit: an unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian ward of the United States; particularly in this, that said defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and

testify as a witness for the said Defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, to wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre.

### COUNT THREE

(Attempting to influence Witness: 18 USC 241)

The above-named defendants John A. Reinhard and Joe Doe (whose true name is unknown, but who is described as being in the company of John A. Reinhard in the transaction hereinafter narrated, and who is a white man aged [5] about twenty-five years, about five feet ten inches in height and weight about one hundred forty-five pounds, and was wearing a big cowboy hat and range clothing at the time mentioned), on or about October 20, 1945, in Sanders County, Montana, in the District of Montana and within the jurisdiction of this court, did unlawfully, corruptly and feloniously endeavor to influence one Pat A. Pierre, a witness in a cause entitled, "United States of America vs. Sam Catrino and John A. Reinhard," then pending in the United States District Court for the District of Montana, in which said Catrino and Reinhard were charged with unlawfully selling a quantity of wine to said Pat A. Pierre, an Indian ward of the United States, in that said Defendants corruptly offered said Pat A. Pierre a sum

of money as a bribe to procure him to testify that a bottle of wine, which was in fact sold to said Pierre by said defendant, John A. Reinhard, was sold to said Pierre by a Mexican, and stated to said Pierre that they would back him up in said false testimony:

A True Bill:

FRITZ NORBY,

Foreman.

JOHN B. TANSIL,

United States Attorney.

[Endorsed]: Filed March 13, 1948. [6]

---

Thereafter on June 4, 1948, a Motion to Dismiss the Indictment was duly filed herein, being in the words and figures following, to wit: [8]

[Title of District Court and Cause.]

### MOTION

Comes now the Defendants and move the Court for an order dismissing the indictment on file herein, and allege and aver:

#### I.

That the first count of said indictment does not **state facts sufficient to constitute an offense against the United States of America, or at all.**

#### II.

That the second count of said Indictment does not state facts sufficient to constitute an offense against the United States of America, or at all.



III.

That the third count of said Indictment does not state facts sufficient to constitute an offense against the United States of America or at all.

Dated this 4th day of June, 1948.

GEORGE F. HIGGINS  
and  
DALTON T. PIERSON,  
By GEORGE F. HIGGINS,  
Attorneys for Defendants.

[Endorsed]: Filed June 4, 1948. [9]

---

Thereafter on July 2, 1948, the Oral Order of the Court denying the Motion to Dismiss the Indictment was duly entered herein, the minute entry of such order being in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana

[Title of Cause.]

Counsel for respective parties were present in Court this day, Mr. Harlow Pease, Assistant United States Attorney, appearing for the United States, and Mr. George F. Higgins appearing for the defendants.

Thereupon defendants' motion to dismiss the indictment, heretofore submitted to the Court, was by the Court overruled and denied, whereupon the defendants excepted to the ruling of the Court and

exception duly noted. Thereupon the defendants moved the Court for an order directing the United States Attorney to furnish them with a copy of the testimony and proceedings had before the grand jury which returned the indictment against them, whereupon Court ordered that said motion be and is denied.

Thereupon Court ordered that the defendants appear before the Court at 10:00 a.m. tomorrow for arraignment and plea.

Counsel for the defendants also made an objection to Counts 1 and 2 of the indictment, as being identical.

Entered in open Court at Missoula, Montana, July 2, 1948.

H. H. WALKER,  
Clerk. [11]

---

Thereafter on July 3, 1948, Motion of defendant Sam Catrino for separate trial was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

### MOTION FOR SEPARATE TRIAL

Comes now the Defendant, Sam Catrino, and moves the Court that he be granted a separate trial

for the reason that the offenses charged are individual offenses.

J. D. TAYLOR,  
By G. F. H.  
GEORGE F. HIGGINS,  
Attorney for Defendant.

Service of true copy acknowledged this 3rd day of July, 1948.

.....  
Assistant United States  
Attorney.

[Endorsed]: Filed July 3, 1948. [13]

---

Thereafter on July 3, 1948, the Oral Order of the Court denying Motion for Separate Trial was duly entered herein, being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

[Title of Cause.]

Defendants were duly called for arraignment and plea this day, said defendants being personally present in Court with their attorney, Mr. George F. Higgins, and Mr. Harlow Pease, Assistant United States Attorney, being present and appearing for the United States.

Thereupon the defendants answered that their true names are, respectively, Sam Catrino, John Reinhard and Lester La Valley. Thereupon the defendants waived the reading of the indictment and



each defendant entered a plea of not guilty, whereupon Court set the case for trial for Wednesday, July 7, 1948, at 10:00 a.m.

Thereupon counsel for the defendants filed and presented to the Court a motion in behalf of each defendant for separate trial, whereupon Court ordered that the motions be and are denied, to which ruling of the Court the defendants then and there excepted and exceptions duly noted.

Thereupon, on motion of Mr. Higgins, Court ordered that the name of James D. Taylor be entered as associate counsel for the defendants.

Thereupon Mr. Higgins stated to the Court that the defendants Reinhard and LaValley are without means with which to procure witnesses needed by them, and moved the Court for an order to subpoena witnesses at the expense of the United States. Thereupon Court directed counsel to consult with the United States Attorney with the view of having any necessary witnesses subpoenaed, and for payment of their fees and mileage at the expense of the United States.

Entered in open Court at Missoula, Montana.  
July 3, 1948.

H. H. WALKER,  
Clerk. [15]

Thereafter on July 7, 1948, Motion to Sever Count Three from the Indictment was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

**MOTION TO SEVER THIRD COUNT FROM  
INDICTMENT**

Comes now the Defendant, Sam Catrino, and moves the Court that Count No. Three in the Indictment be severed therefrom and that he be tried only on the two Counts in said Indictment in which it is alleged that he is a Defendant.

In Count Number One it is charged that he did, on or about March 13, 1946, in the jurisdiction of this Court, solicit and procure and cause one, James Rennaker, to give false testimony and in Count Number Two he is charged with unlawfully, corruptly and feloniously obstructing and impeding the due administration of justice in the District Court of the United States for the District of Montana, in that he corruptly caused one, James B. Rennaker, to give false testimony in a cause then pending in said Court; and

That in the Third Count in said Indictment, which he, the said Sam Catrino, moves the Court to sever from the Indictment against him, he is not charged with being a Defendant; on the contrary, the said Count Number Three charges the co-defendant in Count Numbers One and Two and one unknown person, who is described in Count Number Three as having unlawfully, corruptly and feloniously endeavored to influence one, Pat Pierre, to

give testimony [17] in an action entitled United States of America vs. Sam Catrino and John A. Reinhard, then pending in the United States' District Court of the District of Montana, on the grounds that it is prejudicial to the Defendant to compel him to stand trial on a Count in which he is not made a Defendant, nor wherein it is alleged that he conspired with the Defendants, named in said Count, to commit any crime, as alleged in said Count, and that testimony submitted in support of said Third Count, wherein he is not made a Defendant, will be prejudicial to him in his defense the two Counts in the Indictment in which he is made a Defendant, and that it will deprive him of being tried on an Indictment preferred against him, and in which he is charged with the commission of crime.

That at no place in Count Number 3 of the Indictment is it alleged that Sam Catrino was in any way connected with the offense therein alleged, or that he was in any manner connected with any of the transactions therein set forth.

That this Motion is made on the records and files in said cause and in particular to the Indictment therein.

J. D. TAYLOR,

GEORGE F. HIGGINS,

Attorneys for Defendant.

A true copy received and service accepted this  
7th day of July, 1948, 10:25 a.m.

EMMETT C. ANGLAND,

Asst. U. S. District Attorney.

[Endorsed]: Filed July 7, 1948. [18]

Thereafter on July 7, 1948, Motion to Direct the Government to Elect between Count Number One and Two under which it will proceed was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

MOTION TO DISMISS COUNT NUMBER ONE  
OR TWO OR TO DIRECT THE GOVERN-  
MENT TO ELECT BETWEEN COUNT  
NUMBER ONE AND TWO.

Come now Sam Catrino and John A. Reinhard, two of the Defendants charged in this Indictment, and move the Court for an Order directing that the Government make an election in this prosecution as to Counts numbered I and II of the Indictment, or that an Order be made dismissing either one of these Counts of the Indictment.

This Motion is made for the reason that the charge made in Count Number One and Count Number Two is identical; and that the Defendants will be prejudiced by having both Counts submitted to the jury against them.

There is a duplicity in the charges set forth in Counts Number One and Two and the charge in each one of these Counts charges identical offenses, to wit: subornation of perjury, each requiring iden-

tical proof, neither requiring proof of any fact not required by the other.

J. D. TAYLOR,  
GEO. F. HIGGINS,  
Attorneys for Defendants.

Service by true copy received this 7th day of July, 1948. 10:25 a.m.

EMMETT C. ANGLAND,  
Asst. U. S. District Attorney.

[Endorsed]: Filed July 7, 1948. [20]

---

Thereafter on July 7, 1948, the Oral Order of the Court denying the Motion to Sever Count Three from the Indictment and the Motion to direct the Government to Elect between Count number One and Two under which it will proceed, was duly entered herein, the minute entry as to both motions being as follows, to wit:

In the District Court of the United States in and  
for the District of Montana

[Title of Cause.]

This cause came on regularly for trial this day, the defendants Sam Catrino, John Reinhard and Lester LaValley being personally present with their attorneys Messrs. George F. Higgins and James D. Taylor, and Messrs. Harlow Pease and Emmett C. Angland, Assistants to the United States Attorney, being present and appearing for the United States.



Thereupon counsel for defendants filed and presented to the Court a motion to sever Count Three from the indictment as to defendant Sam Catrino, which motion was by the Court overruled and the exception of defendant noted.

Thereupon counsel for the defendants filed and presented to the Court a motion to dismiss Count number one or Count number two or to direct the government to elect between Counts numbered one and two in this prosecution, which motion was by the Court overruled and the exception of defendants noted.

Entered in open Court at Missoula, Montana,  
July 7, 1948.

H. H. WALKER,  
Clerk. [22]

---

Thereafter on July 9, 1948, the Verdict of the jury was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

### VERDICT

We, the Jury in the above-entitled cause, find the defendant Sam Catrino guilty in manner and form as charged in the Indictment on file herein as to Counts 2 and not guilty as to Counts 1; and find the defendant John A. Reinhard guilty in manner and form as charged in the Indictment herein

as to Counts . . . . . and not guilty as to Counts  
1 - 2 and 3.

LESLIE G. NELSON,

Foreman.

[Endorsed]: Filed July 9, 1948. [24]

---

Thereafter on July 10, 1948, the Judgment of the Court was duly filed and entered herein, being in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana

No. 6784

Criminal Indictment in one count for violation of  
U.S.C. Title 18, Sec. 232.

#### JUDGMENT AND COMMITMENT

On this 10th day of July, 1948, came the United States Attorney, and the defendant Sam Catrino appearing in proper person, and by his attorneys, Messrs. George F. Higgins and James D. Taylor, and,

The defendant having been convicted on the verdict of guilty of the offense charged in count two of the Indictment in the above-entitled cause, to wit: That on or about March 13, 1946, at Missoula, in the State and District of Montana, the defendant did unlawfully, corruptly and feloniously influence, obstruct and impede the due administration of justice in this Court, engaged in the trial of a cause entitled, United States of America vs. Sam Catrino and John A. Reinhard, in that he did cause one James B. Remaker to attend said trial

and be sworn and testify as a witness in behalf of the defendants, to certain false statements, which said defendant and the said Rennaker knew to be false, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is by the Court Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General of the United States, or his authorized representative for imprisonment for the period of one year and six months, and that the said defendant do pay a fine of Three Hundred and Fifty Dollars, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

CHARLES N. PRAY,  
United States District Judge.

Filed and Entered: July 10, 1948. H. H. Walker.  
Clerk. [26]

Thereafter on July 12, 1948, Notice of Appeal was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of Appellant: Sam Catrino, Missoula, Montana.

Name and address of Appellant's Attorneys: J. D. Taylor, Hamilton, Montana, and George F. Higgins, Missoula, Montana.

Offense: In Count Two of the Indictment, the Defendant, Sam Catrino, was charged with obstruction of Justice as follows: "The above-named defendants, Sam Catrino and John A. Reinhard, on or about March 13, 1946, at Missoula, Montana, in the District of Montana and within the jurisdiction of this Court, did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, then in session and engaged in the trial of a cause entitled, "United States of America vs. Sam Catrino and John A. Reinhard," wherein said Defendants were charged with and being tried for a violation of Section 241 of Title 25 of the United States Code, to wit: an unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian Ward of the United States; particularly in this, that said Defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and testify as a wit-

ness for the said Defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, [28] to wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre."

Concise statement of judgment and order, giving the date and sentence: On July 10, 1948, sentenced **to one and one-half years'** imprisonment, and ordered to pay a fine of Three Hundred Fifty Dollars (\$350.00).

I, the above-named Appellant, hereby appeal to the United States' Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: July 12, 1948.

**/s/ SAM CATRINO,**  
Appellant.

**GEORGE F. HIGGINS,**  
**J. D. TAYLOR,**  
Attorneys for Appellant.

Service of the foregoing notice is hereby admitted this 12th day of July, 1948.

.....  
Assistant U. S. Attorney.

[Endorsed]: Filed July 12, 1948.



Thereafter on July 12, 1948, Bond on Appeal was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

### BOND OF DEFENDANT ON APPEAL

Know All Men by These Presents:

That we, Sam Catrino, as Principal, and G. D'Orazi and Mary Catrino, as sureties, jointly and severally acknowledge that we, and our personal representatives are bound to pay to the United States of America the sum of Six Thousand Dollars (\$6,000.00).

The condition of this obligation is such that, whereas, a judgment of conviction was made and entered against the **Defendant, Sam Catrino**, on the 10th day of July, 1948, wherein he was sentenced to one and one-half years' imprisonment and ordered to pay a fine of Three Hundred Fifty (\$350.00) Dollars, and, whereas Sam Catrino, said Defendant and principal obligor in this bond, has filed a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated Judgment,

Now, Therefore, if said Defendant, Sam Catrino, shall prosecute said Appeal to effect or if for any reason the Appeal is dismissed, or if the Judgment is affirmed, the Defendant, Sam Catrino, will surrender himself for the execution of said Judgment to the United States Marshal, in the District Court of the United States, District of Montana, Missoula Division, in accordance with all orders and direc-

tions of the Court, then this bond is to be void. But if the Defendant fails to perform this condition, payment [31] of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States, for the District of Montana, Missoula Division, against each debtor jointly and severally for the amount above-stated and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this 12th day of July, 1948, at Missoula, Montana.

/s/ SAM CATRINO,  
Deft. and Principal.  
Missoula, Montana.

/s/ **G. D'ORAZI**,  
Surety.  
Missoula, Montana.

/s/ MARY CATRINO,  
Surety,  
Missoula, Montana.

Signed and acknowledged before me this 12th day of July, 1948.

Approved:

CHARLES N. PRAY,  
United States Dist. Judge.

(Seal) /s/ H. H. WALKER,

Clerk of the United States District Court, District  
of Montana.

We, G. D'Orazi and Mary Catrino, the sureties named in the above bond, being duly sworn, each for himself, says, that he is a freeholder and resident in said Missoula County and is worth the said sum of Six Thousand Dollars (\$6,000.00) over and above all his debts and liabilities, exclusive of property exempt from execution.

G. D'ORAZI,  
MARY CATRINO.

Subscribed and sworn to before me this 12th day of July, 1948.

(Seal) H. H. WALKER,  
Clerk of the United States District Court, District of Montana.

[Endorsed]: Filed July 12, 1948. [32]

---

Thereafter on August 9, 1948, Statement of Points was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

### STATEMENT OF POINTS

Comes now the defendant and appellant, Sam Catrino, and makes the following statements of points upon which he intends to rely on the appeal.

#### 1.

The refusal of the court to sustain the motion of the defendant to sever Count 3 from the indictment upon the ground that he was not a party defendant in Count 3, and that it was prejudicial to

him in his trial on Count 1 and Count 2 of the indictment.

2.

The refusal of the court to grant the motion of the defendant and appellant to strike Count 2 of the indictment, on the ground that, in legal effect, it is the same charge as is set forth in Count 1.

3.

The refusal of the court to grant the motion of the defendant and appellant to require the plaintiff to elect to try the defendant on Count 1 or Count 2.

4.

The court erred in the admission of testimony, in the trial of said cause, in support of Count 3 of the indictment.

5.

The court erred in instructing the jury that it could find the defendant, Sam Catrino, guilty on Count 3 of the indictment. [34]

6.

The motion of the defendant for an order for the entry of a judgment of acquittal at the conclusion of the Government's case, upon the ground that the evidence was insufficient to sustain a conviction of the defendant and should have been granted.

7.

The court erred in overruling the exceptions of the defendant and appellant to that part of the court's oral instruction to the jury wherein the court failed to instruct the jury that corroborating **evidence was necessary** to entitle the jury to return

a verdict of guilty against the defendant on Count 2 of the indictment.

J. D. TAYLOR,  
GEORGE F. HIGGINS,  
Attorneys for Defendant and Appellant.

Service of the foregoing Statement of Points admitted this 9th day of August, 1948.

EMMETT C. ANGLAND,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 9, 1948. [35]

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Thereafter on August 9, 1948, Order for Transmission of Original Exhibit Number One to the Circuit Court of Appeals was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

#### ORDER FOR TRANSMISSION OF EXHIBITS

Upon application of the defendant, it is hereby ordered that the Clerk of this Court be, and he is hereby authorized to transmit to the United States Circuit Court of Appeals of the Ninth Circuit, original exhibit Number One introduced at the trial of the above entitled cause as part of the transcription of record.

Dated this 9th day of August, 1948.

CHARLES N. PRAY,  
District Judge.

Entered and Noted in Civil Docket, August 11, 1948. H. H. Walker, Clerk.

[Endorsed]: Filed Aug. 9, 1948. [37]



Thereafter on August 9, 1948, Reporter's Transcript of Proceedings was duly filed herein, being Volume number Two of this Transcript, and being in the words and figures following, to wit:

In the District Court of the United States, District  
of Montana, Missoula Division

No. 6784

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM CATRINO, JOHN A. REINHARD and  
LESTER R. LaVALLEY,

Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Before: Honorable Charles N. Pray, sitting with  
a Jury at Missoula, Montana, July 7th, 8th and 9th,  
1948.

Appearances: Mr. Harlow Pease, Asst. U. S. At-  
torney, and Mr. Emmett C. Angland, Asst. U. S.  
Attorney, Attorneys for Plaintiff. Mr. George F.  
Higgins, and Mr. James D. Taylor, Attorneys for  
Defendants. [39]

VOLUME 2

Be It Remembered, that the above entitled cause  
came on regularly for trial in the Federal Build-  
ing, in the City of Missoula, Montana, on the 7th  
day of July, 1948, at 10:00 o'clock a.m., before the  
Honorable Charles N. Pray, sitting with a jury, the

plaintiff being represented by Messrs. Harlow Pease and Emmett C. Angland, Assistant United States Attorneys for the District of Montana, and the defendants being present in person and represented by Messrs. George F. Higgins and James D. Taylor, that the trial continued thereafter on the 8th and 9th days of July, 1948, and the following proceedings were had:

Court: Well, gentlemen, I see we have on the calendar this morning No. 6784, United States vs. Sam Catrino, John [43] Reinhard and Lester R. LaValley. Are you ready for the government in that case?

Mr. Pease: The government is ready.

Court: How about the defense?

Mr. Higgins: The defense is ready.

Mr. Pease: If your Honor please, I would like to call attention to the fact we have just been served with two motions on behalf of the defendants. I don't think we should be required to resist the motions after the trial has commenced.

Court: I think you are a little late.

Mr. Taylor: We are requesting permission to file motions to sever the third count insofar as the defendant Sam Catrino is concerned.

Court: I think the Court will sufficiently instruct the jury under instructions he will give. It seems to me we have gone over this matter heretofore on motion to dismiss, and that question has been talked about and discussed. I will overrule the motion. You may file it and I will overrule it.

You may take an exception. Have you another motion?

Mr. Higgins: Merely in connection with one presented Saturday morning orally. It calls upon the government to make an election as to count 1 or 2.

Court: I ruled on that already.

Mr. Higgins: May I be permitted to file the motion?

Court: Yes, and save your exception on it. [44]

Mr. Higgins: Not an exception.

(Thereupon, a jury was duly impaneled and sworn.)

Court: You may proceed with your statement.

Mr. Angland: Ladies and gentlemen of the jury now, rather than prospective jurors: At this time we are given an opportunity to summarize for you what we expect to prove in this case so that as the witnesses testify on the stand to the facts, they will unravel the story for you in chronological order as near as it is possible for us to present the case in that way. It isn't always possible to present it in perfect chronological order.

This case has a history beginning October 20, 1945. On that date we will show to you that one Pat Pierre, an Indian ward of the United States Government, went into the Brunswick Bar in Missoula, Montana, and purchased wine from John Reinhard, in the presence of the proprietor of the Brunswick Bar, Sam Catrino. Pat Pierre, being an Indian ward of the government and a juvenile at the time, of course, was not permitted to pur-

chase the liquor. The law prohibits the sale of that wine to him.

The local police officer, Mr. Greenfield, I believe it is, or Greenleif, Greenfield, I think it is, saw the sale, and when Pierre came out of the Brunswick Bar, Mr. Greenfield took the wine from him. On October 22nd, two days later, the Indian officers of the United States Government, that is, the Indian police, came to Missoula and arrested Mr. Catrino and Mr. Reinhard for having sold the wine to the Indian in violation of the law prohibiting the sale of liquor to an Indian ward of the government. They were taken on that date before the United States Commissioner and charged. Now, a formal charge against them was made in this Court on November 29, 1945, and at a later date that case was set for trial in this courtroom. On March 13, 1946, during the course of the trial, it became apparent that, we will show you through the transcript of what took place during the trial, there had been some perjured testimony presented on behalf of the defendants, Catrino and Reinhard.

One James Rennaker, who sits in the front row over there, was called as a witness by the defendants, and he testified on the stand before the jury trying Catrino and Reinhard for the violation of the Indian liquor law. Rennaker testified on the evening of October 20th, he was in the Brunswick Bar, and that Pat Pierre had approached him and asked him to buy the wine for him. Mr. Rennaker said—that is, he testified during that trial—that he refused Pierre, and then he observed Pierre go

over to a Mexican and asked this Mexican to buy him some wine, and he saw the Mexican buy the wine for Pierre at the bar from Reinhard in the presence of Catrino.

Now, Mr. Rennaker also stated—we asked him how he knew he had been in the Brunswick Bar on the evening of October 20, [46] 1945, and he stated he had checked his records, the records he maintained at that time as a trucker. He was in the trucking business, trucking and hauling cattle. He said he had kept records and checked the records and found he had driven that day to the Missoula Livestock Yards and up to Post Creek, Montana, and when he came back into Missoula, he stopped in the Brunswick Bar. That, in substance, is the story given to the jury that tried the other case.

The true facts, as Mr. Rennaker will testify to on the stand in this case are that shortly after, or between the time that Catrino and Mr. Reinhard were arrested for the Indian Liquor Law violation, Catrino and Reinhard came to Rennaker, and Catrino advised Rennaker he had helped him in the trucking business, and now it was Rennaker's turn to help him, and he said, "I have a mortgage, or I have the title to your trucks, and either you will help me or I'll put you out of business, and you will go into that courtroom"—this courtroom—"and tell the court and jury the story that I have just related to you, or else I'll take the trucks." He will tell you now the true fact is that his records show he was in Butte, Montana, that evening. He



couldn't have been in the Brunswick Bar. He hauled a load of cattle to Butte. He didn't know Pat Pierre, he had never seen Pat Pierre before the day he came into this courtroom, never seen him before that time, notwithstanding the fact he told that jury he had seen Pat Pierre many times before the occasion on which he had seen him in the Brunswick Bar. Mr. Rennaker at this time will come in and tell you what the true story is on that.

Further, we will show that this story wasn't given to Mr. Rennaker. He wasn't just told once, but he was carefully coached, carefully and thoroughly by Catrino, and on the morning of the trial that was held in this courtroom on March 13, 1946, Mr. Reinhard went down to Mr. Rennaker's house and wanted to take him to the Brunswick Bar before they came up to the courtroom, and Mr. Rennaker said, "No, I have a truck here, and I'll drive to the bar," as he was informed that is where the people were meeting before they came up to the Court, and he did drive down to the Brunswick Bar and Catrino again coached him and again prompted him on the fabricated, perjured story he was to present in this courtroom, and furnished him with several drinks of liquor for the purpose of bolstering his nerve. During the noon recess on that day—the case was tried March 13th—during the noon recess, the group returned to the Brunswick Bar and bolstered their courage again, and on that afternoon Rennaker did come into the courtroom and give the false story I have related to you. Of course, if

that story had been believed by the jury sitting in your place on that trial, Catrino and Reinhard would have been acquitted, but we will show you that the jury did not believe that story and Catrino and Reinhard were convicted for a violation of the Indian Liquor law, as alleged in the charge at that time. They were found guilty in this courtroom on that charge. So, of course, that jury has determined that that testimony was false.

Now, further, we will show that shortly before the trial on March 13, 1946, Reinhard and LaValley drove up to Plains, Montana, and they rounded up an Indian there who could help them find Pat Pierre, the Indian ward that they were charged—Catrino and Reinhard were charged—with having sold wine to on October 20th. They found Pierre and Reinhard asked Pierre to come into this Court and fabricate a story and to say that he had approached the bar and asked for this wine in the Mexican language. Part of the defense in that case, as we will show you, was to the effect that there were a lot of Mexicans in the Brunswick Bar that night. However, we will have ample witnesses to prove that there were very few patrons in the bar. Patrick Pierre was offered \$100 by Mr. Reinhard if he would come into this courtroom and fabricate the story. Pierre did not accept the \$100 and would not fabricate the story. Notwithstanding, the charge here is, as to one count, based on that. It was an attempt to influence the witness, and the attempt,

of course, because it failed, is, nevertheless, an offense and violation of the law.

Now, there is another Indian, Fred Old Horn, who was present and heard this conversation when Pierre was offered the [49] \$100, and he will also testify before you to show what actually took place. After the approach had been made, the attempt to get Pierre to take the \$100, they drove Pierre and Old Horn back to Missoula and talked and pleaded with him, and LaValley assured him he would back him up if he would come in here and fabricate this story. They came back to Missoula, Pierre and Old Horn with them, but the fact is that the venture wasn't successful, and the charge is attempting to influence the witness only.

I haven't read the indictment to you, ladies and gentlemen. Mr. Pease has suggested to me that it would be a good idea to point out to you the facts relating to the different counts of this indictment so you will get the import of the evidence. The first count is the subornation of perjury charge. The charge in the indictment is, "The above named defendants, **Sam Catrino, and John A. Reinhard**, on or about March 13, 1946, at Missoula, in the District of Montana, and within the jurisdiction of this court, did unlawfully, corruptly and feloniously, procure one James B. Remaker, to commit perjury as follows: the said defendants, **Sam Catrino, and John A. Reinhard**, were charged in the District Court of the United States for the District of Montana, with a crime against the sovereignty

of the United States, to-wit, violation of Section 241 of Title 25, U.S.C.A., viz., an unlawful sale of liquor to an Indian ward of the government, alleged to have been committed on October 20, [50] 1945, at a saloon known as the Brunswick Bar in Missoula, Montana; said cause came on for trial on March 13, 1946; on and prior to said date, the said defendants, Sam Catrino and John A. Reinhard, solicited, procured and caused the said James Rennaker to appear as a witness in the said United States District Court on March 13, 1946, upon the trial of said cause and to be by the Clerk of said Court sworn as a witness in said cause and to testify that he, the said James B. Rennaker, on the late evening of October 20, 1945, was in the said Brunswick Bar and there saw a Mexican person buy a quantity of wine at the bar of said saloon, and deliver the same to one Pat A. Pierre; that said testimony so given was false and known by the defendants Sam Catrino and John A. Reinhard, and by the said James B. Rennaker, to be false; that in truth and in fact, said James B. Rennaker was not in said place, nor in the city of Missoula at the time referred to, to-wit, the late evening of October 20, 1945, but was in or near the city of Butte, Montana, and that in truth and in fact, he did not see any person sell any wine or other liquor to the Indian ward, Pat A. Pierre, on October 20, 1945."

Now, the second count of the indictment is a charge of obstruction of justice. You will note the

similarity of the evidence that will be presented in support of the first two counts as I read this: "The above-named defendants Sam Catrino and John A. Reinhard on or about March 13, 1946, at Missoula, [51] Montana, in the District of Montana and within the jurisdiction of this court, did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, then in session and engaged in the trial of a cause entitled, "United States of America vs. Sam Catrino and John A. Reinhard," wherein said defendants were charged with and being tried for a violation of section 241 of Title 25 of the United States Code, to-wit: an unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian ward of the United States; particularly in this, that said defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and testify as a witness for the said defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, to-wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre."

You will note from that the similarity in the two charges.



Now, the third count is attempting to influence a witness. "The above-named defendants John A. Reinhard and John Doe"—Lester R. LaValley it would be now—"Lester R. LaValley, on or about October 20, 1945, in Sanders County, Montana, in the District of Montana and within the jurisdiction of this court, did unlawfully, corruptly and feloniously endeavor to influence one Pat A. Pierre, a witness in a cause entitled, 'United States of America vs. Sam Catrino and John A. Reinhard,' then pending in the United States District Court for the District of Montana, in which said Catrino and Reinhard were charged with unlawfully selling a quantity of wine to said Pat A. Pierre, an Indian ward of the United States, in that said defendants corruptly offered said Pat A. Pierre a sum of money as a bribe to procure him to testify that a bottle of wine, which was in fact sold to said Pierre by said defendant John A. Reinhard, was sold to said Pierre by a Mexican, and stated to said Pierre that they would back him up in said false testimony."

Court: Does the defense care to make a statement at this time?

Mr. Taylor: We waive at this time, if the Court please.

Court: Very well. Call your first witness.

G. C. VAUGHAN,

called as a witness on behalf of the plaintiff,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland:

Q. Your name is G. C. Vaughan, is that it? [53]

A. Yes, sir.

Q. Where do you reside, Mr. Vaughan?

A. Boise, Idaho.

Q. What is your occupation at Boise, Idaho?

A. I am a court reporter in the United States Court for the District of Idaho, and also law clerk and secretary for Judge Clark.

Q. That is for the United States District Judge for the District of Idaho?

A. That's right.

Q. In your capacity as a court reporter, were you called upon to report a case in this courtroom on March 13, 1946?

A. Yes, sir.

Q. A case presided over by Judge Clark?

A. Yes, sir.

Q. And how long have you been a court reporter, Mr. Vaughan?

A. Since 1920.

Q. You have been a professional court reporter since that time and reported cases in court and transcribed them?

A. That's right, in the United States District Court of Idaho since 1932.

Q. You have sat in the trial of cases and taken

(Testimony of G. C. Vaughan.)

notes in shorthand and then transcribed them on a typewriter?

A. That's right, sir.

Q. On the trial of this case, did you take the proceedings in [54] shorthand?

A. Yes, sir.

Q. Did you correctly take all that was said by the witnesses who were called to testify in that case?

A. By the witnesses, yes, sir.

Q. And after you had taken that testimony in shorthand, did you later transcribe it on a typewriter?

A. Yes, sir.

Q. And you correctly transcribed it, Mr. Vaughan?

A. Yes.

Court: What was the date of that trial?

Mr. Angland: March 13, 1946, your Honor.

Q. I will hand you, Mr. Vaughan, what has been marked as Plaintiff's Proposed Exhibit number 1, and ask you whether or not you know what that is?

A. Yes, I do.

Q. What is it?

A. It is a transcript in the case of United States of America, Plaintiff, against Sam Catrino and John A. Reinhard, a transcript of the evidence given in the trial had on March 13, 1946, in Missoula.

Q. In this courtroom?

A. That's right, sir.

Q. And that is a correct transcription taken from your shorthand notes? [55]

A. That's right.

(Testimony of G. C. Vaughan.)

Q. You have the shorthand notes with you if they are asked for?      A. I have.

Mr. Angland: May it please the Court, the instructions are also transcribed in the back of this, and I don't believe we ought to offer them.

Court: What you propose to do is offer what you may deem material in this case?

Mr. Angland: We will offer at this time, your Honor, all of the evidence contained in the transcript.

Court: Have counsel for the defendant had an opportunity to examine a copy of that transcript so they are familiar with it?

Mr. Angland: We loaned that to Mr. Higgins sometime ago, your Honor.

Court: I see.

Mr. Pease: That is the same transcript, Mr. Higgins.

Court: Any objection, gentlemen?

Mr. Taylor: No, your Honor.

Court: Very well, you have offered it. It may be received in evidence.

Mr. Angland: Just the evidence in the case. I imagine I will have to read the transcript at this time. It is an exhibit. [56]

Court: Either you can read it, or you can have the gentleman who took it read. He is the witness now on the stand.

(Whereupon, Plaintiff's Exhibit 1, being a transcript of the evidence taken at Missoula,

(Testimony of G. C. Vaughan.)

Montana, on March 13, 1946, in the District Court of the United States, in and for the District of Montana, in Cause No. 6718, United States of America, Plaintiff, vs. Sam Catrino and John A. Reinhard, Defendants, was received in evidence and was read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk of the above entitled Court.)

Court: Have you anything further documentary?

Mr. Angland: No, your Honor.

Mr. Taylor: There is no cross examination of this witness.

Mr. Angland: I would ask then, your Honor, that this witness be permanently excused. He is required in the course of his duties to get back.

Mr. Taylor: It is agreeable to us.

Court: Very well, Mr. Vaughan will be excused.

(Whereupon, at 5:00 o'clock p.m., July 7, 1948, an adjournment was taken until 10:00 o'clock a.m. July 8, 1948, at which time the following proceedings were had, the jury being present, and the defendants being present in person and represented by their counsel.)



## H. H. WALKER,

called as a witness on behalf of the plaintiff,  
being first duly sworn, testified as follows: [57]

## Direct Examination.

By Mr. Angland:

Q. You are Mr. H. H. Walker?

A. Yes, sir.

Q. You reside in Helena, Montana?

A. Yes.

Q. Your official capacity is Clerk of the District Court of the United States, District of Montana?

A. Yes, sir.

Q. And as such clerk, you have in your custody the official records of the Court?

A. I have, yes.

Q. Do you have with you the record showing the trial in Criminal Cause No. 6718, Missoula Division, entitled, "United States vs. Sam Catrino and John Reinhard?"

A. Yes, sir.

Q. Does your record show, Mr. Walker, when the two defendants were first arrested and arraigned before the United States Commissioner?

A. October 22, 1943, it says here, or 1945.

Q. What was the charge made before the United States Commissioner, Mr. Walker?

A. That the defendants did furnish and sell liquor to an Indian Ward of the United States Government, to-wit: wine.

Q. Was there subsequent to that filing an information filed [58] in this court?

A. Yes, sir.

(Testimony of H. H. Walker.)

Q. What was the charge made at that time?

A. That on the 20th day of October, 1945, the defendants sold, gave away, disposed of, exchanged and bartered to an Indian person named Pat A. Pierre certain vinous and intoxicating liquor, to-wit, wine.

Q. That is charged against Sam Catrino and John Reinhard jointly?      A. Yes.

Q. Were you present, Mr. Walker, at the time that case was tried?      A. I was.

Q. Does your record show the date of the trial?

A. On March 13, 1946.

Q. Do you know the two defendants who were tried at that time?      A. I do.

Q. Are they present in court?

A. They are, the two men on the right, the man in the center and on the right.

Q. Do you know which is which?

A. Sam Catrino is in the center and Reinhard on this side.

Q. Was that case, according to your record, submitted to a jury, Mr. Walker? [59]

A. It was, yes.

Q. During the course of the trial, does your record show that one James B. Remmaker was sworn and testified as a witness?

A. I haven't that part of the record here. That isn't in the judgment roll. The minutes are all kept in Helena, and I wasn't instructed to bring them along, so I didn't look them up.

(Testimony of H. H. Walker.)

Mr. Angland: We have the transcript also in evidence, your Honor. That shows he was sworn and testified.

Q. The witnesses in the case were sworn by the Clerk?  
A. Yes, oh, yes.

Q. Either yourself or a deputy duly authorized to swear witnesses?  
A. Yes.

Q. What was the verdict of the jury in that case according to your record, Mr. Walker?

A. Two verdicts, one against each, but they are identical. We, the jury in the above entitled cause, find the defendant in the above entitled cause guilty in the manner and form as charged herein.

Q. As to each defendant?

A. As to each defendant.

Q. Was there ever any appeal filed in that case, Mr. Walker?

A. No, the defendants came right in and paid their fines.

Mr. Angland: You may cross examine.

Mr. Taylor: No cross examination.

(Witness excused.)

MRS. ESTHER RENNAKER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland:

Q. Will you state your name, please?

A. Esther Rennaker.

(Testimony of Mrs. Esther Rennaker.)

Q. Where do you live, Mrs. Rennaker?

A. On the south side, 616 Ivy.

Q. In Missoula? A. Yes.

Q. Are you the wife of James B. Rennaker, the gentleman sitting back of the rail? A. I am.

Q. Were you the wife of Mr. Rennaker, James B. Rennaker on March 13, 1946?

A. I was, yes.

Q. In what business was Mr. Rennaker engaged between October 20, 1945 and March 13, 1946?

A. He was stock hauling, trucking.

Q. Trucking stock? A. Yes. [61]

Q. In and about Missoula, Montana.

A. That's right.

Q. And to other points in the State of Montana?

A. That's right.

Q. Did you assist Mr. Rennaker in that business in any way?

A. I took the telephone calls at home, and sometimes I would go with him.

Q. On trips you mean, hauling? A. Yes.

Q. Did you keep a record? A. I did.

Q. The record was kept by you in your handwriting? A. That's right.

Q. Was that record accurately kept?

A. Absolutely.

Q. Mr. Rennaker continued in the stock hauling and trucking business after March 13, 1946?

A. Yes, he did.

Q. I will hand you, Mrs. Rennaker, what has

(Testimony of Mrs. Esther Rennaker.)

been marked as Plaintiff's Exhibit 2, and ask you if you know what that is?       A. I do.

Q. Do you know what that book is I have handed to you?       A. This is my record book.

Q. Do you have in that book entries dated October 20, 1945?       A. I do. [62]

Q. Will you open the book to the entries on that date, please?       A. There it is.

Q. Now, Mrs. Rennaker, are there any entries in that book on October 20, 1945, showing whether or not Mr. Rennaker hauled any cattle to Post Creek, Montana, from the Missoula Livestock Yards in Missoula, Montana?       A. No.

Q. There are not?       A. No.

Q. And you stated that the record is accurately kept?       A. That's right.

Q. And kept in your handwriting?

A. That's right.

Q. Can you tell by referring to that record where Mr. Rennaker was on the evening of October 20, 1945?       A. He was in Butte.

Q. And how can you tell that from your record, if you will just advise the court and jury as to that, will you?

A. Well, most generally it was right around noon or shortly after noon when he would leave here, and it takes quite a while to go to Butte, and I happened to be with him.

Q. You state you happened to be with him. Do



(Testimony of Mrs. Esther Rennaker.)

you recall having made the trip to Butte, Montana, with Mr. Rennaker on October 20, 1945?

A. I do. [63]

Q. You recall having made that trip. Do you recall at about what time on that day you arrived in Butte, Montana?

A. It was right around midnight, because we had a little trouble finding the place and asked at a filling station where it was.

Q. That is the place you were looking for?

A. The place we were looking for.

Q. To whom were you delivering cattle on that date?      A. Parke Davis.

Q. Do you recall at about what time that day you left Missoula, Montana?

A. It was in the afternoon sometime.

Q. Do you recall at about what time you left Butte to return to Missoula?

A. Well, we left right after we unloaded the cattle, and it was close to midnight when we got in there.

Q. So it would be sometime in the early morning of October 21st when you left Butte to return to Missoula, Montana?

A. Yes, sir.

Q. Let me look at the record, please. The record at the bottom—let me mark this, if I may. I wonder if you would mark that Exhibit 2A. The Clerk has marked a page in this book Plaintiff's Exhibit 2A. Is the record you referred to, the last entries

(Testimony of Mrs. Esther Rennaker.)

on that page, the bottom of the page with the number 20 beginning the entry, is that October 20, 1945? [64]      A. Yes.

Q. The top of the page is "Hauls for October," and that indicates the 20th day?      A. Yes.

Q. Do you want to look at this before I ask you any further questions on it? Mrs. Rennaker, were the entries shown on the respective dates on that page, Plaintiff's Exhibit 2A, made on the date shown in the entry?      A. Yes, they were.

Q. That is, the entry dated the 20th of October was made on the 20th of October, or possibly on the 21st of October, on or about that date?

A. That's right.

Q. And that would be the same as to any other haul for any respective date shown there?

A. Yes.

Q. I will ask you one other item. There are four entries, Mrs. Rennaker, for the date October 20, 1945. The third entry is "One load, P. Davis, Butte," is that the one about which you have testified?

A. That's right. The others were made with the other truck. We had two trucks at the time.

Q. The entry following that entry was not made by Mr. Rennaker?      A. No. [65]

Q. That was made by somebody in his employ?

A. My brother. He drove the other truck.

Q. That does not indicate that haul was made after the Parke Davis haul, is that correct?

(Testimony of Mrs. Esther Remmaker.)

A. No. They were just all made the same day, and I just wrote them down as I came to them.

Mr. Angland: At this time we offer Plaintiff's Exhibit 2A in evidence.

Court: Any objection, gentlemen?

Mr. Taylor: No objection. That is restricted to that page?

Mr. Angland: Just to this page.

Court: It may be received in evidence.

(Plaintiff's Exhibit 2A, here received in evidence, is as follows:)

# PLAINTIFF'S EXHIBIT 2-A

## Hauls for October

1	1 load for Teasdale .....	7	21.00	.63
	1 load C. McClain.....	..	6.00	.18
2	7 loads Dalys .....	69	17.50	.53
	1 load Reardon (Lolo).....	3	6.00	.18
3	3 loads M. Flynn.....	34	25.00	.75
4	1 load B. Kalapuick.....	5	3.00	.09
	1 load J. Kuhl.....	8	15.00	.45
5	1 load B. Mercer.....	6	5.00	.15
	1 load H. Sol .....	4	3.00	.09
	1 load M. Flynn.....	7	2.50	.08
	1 load C. Reardon .....	11	4.00	.12
	2 loads E. Albers .....	22	5.00	.15
	1 load C. Prepstol .....	12	9.00	.27
	1 load P. Davis.....	21	30.00	.90
	2 load B. Mercer .....	24	10.00	.30
	1 load B. Klapuick .....	10	3.00	.09
	1 load J. Mathieus.....	1	3.00	.09
6	1 load hogs Dalys.....	13	2.50	.08
	1 load Opitz .....	8	2.50	.08
9	1 load Barnes .....	3	7.00	.21
	1 load Richardson .....	4	6.00	.18
10	1 load McClay .....	10	3.00	.09
12	1 load B. Mercer .....	9	5.00	.15
	1 load H. Sol .....	5	3.00	.09
1	load M. Flynn .....	5	2.50	.08
	1 load B. Mercer .....	7	5.00	.15

(Testimony of Mrs. Esther Remmaker.)

13	1 load Opitz .....	12	2.50	.08
	3 loads Dalys .....	56	7.50	.23
	1 load Edwards horses .....	5	12.00	.36
			never paid	
14	1 load Flynn (horses) .....	..	14.00	.42
	1 load Olson (horses) .....	8	25.00	.75
15	1 load hogs Dalys .....	32	15.00	.45
	2 loads Dalys (Hamilton) .....	43	30.00	.90
	Inspection .....	..	4.30	....
16	1 load A. Deschamps .....	2	3.00	.09
	1 load Opitz (Msla Orchards) .....	6	4.00	.12
17	6 loads Dalys (Milwkee) .....	56	15.00	.45
	1 load A. Deschamps .....	9	3.00	.09
18	1 load D. Maloney .....	4	3.00	.09
19	1 load Sturm .....	3	3.50	.11
	2 loads Klapuick .....	12	6.00	.18
20	1 load Dalys .....	4	2.50	.08
	1 load Opitz .....	12	2.50	.08
	1 load P. Davis (Butte) .....	25	30.00	.90
	1 load Nagy .....	4	3.00	.09

Q. Now, Mrs. Remmaker, can you tell from looking at Plaintiff's Exhibit 2, from your book, when Mr. Rennaker went out of the trucking business?

A. Well, almost.

Q. Well, let me ask this question of you. Can you tell whether or not he was still in the trucking business on March 13, 1946?

A. Yes.

Q. He was in the business?

A. Yes. [67]

Q. Do you know whether or not, since you kept the records for Mr. Remmaker, the trucks that he was using to haul cattle were paid for and his on March 13, 1946?

A. No.

Q. They were not?

A. No.

Q. Do you know who held the title to those trucks?

A. Sam.

Q. By Sam do you mean Sam Catrino?

A. That's right.

Q. He held that on March 13, 1946?

(Testimony of Mrs. Esther Rennaker.)

A. That's right.

Q. Now, Mrs. Rennaker, do you recall the event of the trial of Sam Catrino and John Reinhard in this courtroom on March 13, 1946?

A. I remember it, but I wasn't here.

Q. You weren't in the courtroom, but you do recall the date?      A. No, I don't.

Q. Do you recall your husband, in the presence of either John Reinhard or Sam Catrino, stating anything about coming up to the courtroom to testify in that case?

A. The morning of the trial John Reinhard came to the house and asked him if he had a way of coming, and he said he would take the truck.

Q. Did he say where he would come to? [68]

A. They were all to meet at the Brunswick.

Q. This is a conversation that you are testifying about matters that took place between your husband, James Rennaker, and John Reinhard?

A. That's right.

Q. And about what time of the day, if you recall?

A. It was in the morning, I don't know just what time.

Q. Was it at about eight o'clock, or nine o'clock in the morning, or seven o'clock?

A. I would say it would be about nine or after. It was between nine and ten, I think.

Q. Was anything further said between John Reinhard and your husband that morning?



(Testimony of Mrs. Esther Rennaker.)

A. Well, John just said—(interrupted)

Mr. Higgins: Just a minute, to which we object unless it is shown to have been made in the presence of Sam Catrino, one of the defendants.

Court: Well, of course, if it wasn't in the presence of Sam Catrino, it couldn't be held as against him, whatever statement might have been made then. What are the facts? Do you want to inquire as to that as to whom was present?

Mr. Higgins: The only persons—I believe she has testified the only persons present were her husband and John Reinhard.

Court: Very well, I will permit her to testify. Go ahead. [69]

Q. Let me ask you this, Mrs. Rennaker. Can you name the persons present in your house at the time this conversation took place?

A. My husband was there, and John Reinhard, and myself, and my youngsters.

Q. Your youngsters, how old are they?

A. Twelve, ten, eight and five.

Q. That is about the age they were at that time, or is that their age now? A. Their age now.

Q. What was the conversation between John Reinhard and your husband at that time?

A. Well, John came in and asked him if he had a way of coming, and he said, "Yes," he had the truck. John said, well, he had to go see another witness, see if Rhoda Wells, I believe he called

(Testimony of Mrs. Esther Rennaker.)

her, he wanted to go down and see if she had a way of coming.

Q. Was there anything else said, Mrs. Rennaker?      A. I don't think so.

Court: Do you people on the jury hear her? Very well.

Mr. Angland: You may cross examine.

**Cross Examination**

By Mr. Taylor:

Q. As I understand you, Mrs. Rennaker, on the morning of the trial, that would be March 13, 1946, Mr. Reinhard came to [70] the house and asked your husband if he had any way of going to court, is that it?      A. That's right.

Q. And at that time, that was the extent of the conversation, is that correct?

A. Yes, well, yes.

Q. I notice in your Exhibit A, Mrs. Rennaker, that on a particular October 20th there are several entries of trips made which you say now were made by your brother?      A. That's right.

Q. What page was that on? Do you remember the page number, Mr. Angland? Now, by that you mean on page—on the page marked Plaintiff's Exhibit 2A, you have an entry "20." That would be October 20th, I assume. "One load Dalys"—

A. Dalys.

Q. And "One load Opitz?"

A. One load Opitz.

Q. And "One load Davis," and following that,

(Testimony of Mrs. Esther Rennaker.)

“One load Nagy?”           A. That’s right.

Q. Do you want the court and jury to understand that those entries were made on the 20th or 21st of October?

A. They were made the 20th, but with the other truck, the small loads were made by the small truck.

Q. I think you misunderstand me, Mrs. Rennaker. I am asking [71] if you want the Court and jury to understand that the entries you made in this book concerning those trips were made on the 20th or 21st of October?

A. I generally made them just as soon as I got back.

Q. I will ask you specifically if it isn’t a fact that all entries made in Plaintiff’s Exhibit 2A were made at the one and the same time?

A. That’s right.

Q. You have entries there that disclose trips made on October 1, right on down to the 20th?

A. That’s right.

Q. I am asking you if all those entries were placed in the book at the same time?

A. No, they weren’t made at the same time. They were made date by date.

Q. You want the Court and jury to understand that every entry made on this page, Exhibit 2A, was made at the time and on the date disclosed on the entry?           A. Yes.

(Testimony of Mrs. Esther Rennaker.)

Q. Now, when did you learn that your brother had made these trips?

A. They were made before we left for Parke Davis.

Q. There is one entry made after the entry made for the Davis load. That Nagy is made after?

A. I didn't take them just the way he made the loads. [72]

Q. Do you know where the load for Daly's was taken?

A. To the slaughter house.

Q. In Missoula?

A. That's right.

Q. And the load of Opitz?

A. To the slaughter house.

Q. And the load to Davis?

A. To Butte.

Q. And the load to Nagy?

A. It was just a short trip.

Q. How does it happen that in this book you have recorded or registered the place that the Davis load was hauled to?

A. If you will notice, I have all the long loads marked that way because I just did that all the way through. The long loads were marked by the towns.

Q. Did you take any of these entries from other slips and put them in the book subsequent to the time deliveries were made?

A. What?

Q. Were any of these entries taken from slips? For instance, your brother, you say, delivered the Daly load and the Opitz load. Did he have a slip from that from which you would put this in the book?

(Testimony of Mrs. Esther Rennaker.)

A. No, I did that from calls to the house and just as soon as they were made, I would enter them in the books. [73]

Q. You would enter the charge made for the respective loads? A. Yes.

Q. You say that your husband was still in the trucking business on the 13th day of March, 1946?

A. Yes.

Q. And you want the Court to understand that the title to the trucks that he was operating was held by Mr. Catrino? A. One was, yes.

Q. In what form was the title held? Do you mean he held the title or had a chattel mortgage?

A. He had the title in his own name.

Q. In his own name? A. That's right.

Q. That was one of the trucks?

A. That's right.

Q. You say he had two trucks?

A. That's right.

Q. How was the other truck? In whose name was the title to it?

A. I don't know which truck it was. He had **several of them there.**

Q. On the 13th day of March, did Mr. Catrino have title to the two trucks your husband was operating? A. No, he had title to one.

Q. Did he have any security, any liens on the other truck? [74] A. I don't know.

Q. Now, was your husband divested of title to these trucks by Mr. Catrino? A. What?



(Testimony of Mrs. Esther Rennaker.)

Q. Did Catrino take the trucks or foreclose the liens he had after the 13th of March?

A. He just took the trucks. It was after the 13th. I have it marked down there when he took the trucks.

Q. Could you tell—do you recall whether Mr. Catrino took the trucks from your husband before March 13, 1946, or after?      A. After.

Q. After March. Do you recall when your husband went to Great Falls recently?      A. Yes.

Q. Was it after he went to Great Falls or shortly before?

A. Quite awhile before he went to Great Falls.

Q. How long before, Mrs. Rennaker?

A. I just don't know.

Q. Was it a month or a week?

Mr. Pease: If your Honor please, the witness has indicated she made a notation in the record book as to when the truck was repossessed by Catrino and I think she should be permitted to refer to that to refresh her recollection.

Court: You can do that on re-direct.

Mr. Taylor: It wasn't on this page. [75]

Mr. Pease: She says it was there. Give her a chance.

Court: Proceed.

Q. You haven't any independent recollection, Mrs. Rennaker, whether it was shortly before your husband went to Great Falls that Mr. Catrino took the trucks?

A. He took them quite awhile before he went.

(Testimony of Mrs. Esther Rennaker.)

Q. What would you mean by quite awhile, a month, six weeks?      A. It was longer than that.

Q. How long would you say?

A. I don't remember. I wrote it in the book.

Q. Would it help you any to look at the book to refresh your recollection?

A. Yes, it would. He took the semi right after the 24th of February, 1947.

Q. When after the 24th of February, 1947?

A. Yes, and he took the other one in the first part of May of 1947.

Q. When was that last, the first part of May?

A. Yes, of 1947.

Q. Now, with reference to the first part of May, 1947, when did your husband go to Great Falls? Is that disclosed in your book? In any event, up to the first day of May, 1947, Mr. Catrino had not exercised his right to do what he pleased with the mortgage or whatever security he had on the truck. He permitted Mr. Rennaker to keep one of the trucks to the 24th [76] of February, 1947, and the other until the first part of May, 1947, is that correct?      A. Yes.

Q. And it was after, in any event, after the first part of May, 1947, that your husband went to Great Falls, is that correct?

A. I don't remember when he went to Great Falls.

Q. It would be after those dates or before?

A. It was after.

Q. Yes. Now, did you know that your husband

(Testimony of Mrs. Esther Rennaker.)

—did you know how it happened that Mr. Reinhard came down to the house on the 13th day of March to bring your husband up to the court, or the Brunswick, or wherever they were to meet?      A. No.

Q. Do you know whether they had previously arranged, or that your husband had requested Mr. Reinhard to come and get him, that he had no way **of getting up there?**      A. No, I don't.

Q. You don't know anything about that?

A. No.

### Re-direct Examination

By Mr. Angland:

Q. You have been asked some questions about when your husband went to Great Falls. What idea did you have as to what trip to Great Falls was being talked about? [77]

A. I didn't know, I don't know what they were talking about.

Q. You don't know what trip to Great Falls that Mr. Taylor was talking about when he asked those questions?      A. No.

Q. You have testified as to when Catrino took the trucks from your husband. You said the semi was taken right after February 24, 1947. Will you tell the Court and jury how you can determine that from your record?

A. Well, every haul that was made was either made by the small truck or the semi, and if it was made by the semi, I have semi. The last record I have in here was made the 24th of February.

(Testimony of Mrs. Esther Rennaker.)

Q. 1947? A. Yes.

Q. Does that record also show the purchase of gas and oil and repairs to the truck, or what does it record?

A. I have my last record made the 27th of March, or February it is.

Q. Rather than the 24th of February?

A. Yes.

Q. You find the entry now for the 27th of February, 1947, is that right? A. That's right.

Q. You are certain that is the last date on which the semi-truck made a trip? [78]

A. That's right.

Q. So that thereafter Mr. Rennaker did not use that truck for any hauling? A. No.

Q. By the semi, you mean a large truck with a detachable trailer, is that right?

A. That's right.

Q. That is what you have referred to?

A. Yes.

Q. It had a large rack for hauling cattle?

A. A great big long rack, yes.

Q. A big long rack. The other truck you state was taken by Mr. Catrino the first part of May, 1947. Will you tell the court and jury how you determine that from your record?

A. Well, my last expenses were the 8th of May.

Q. That is the last expense for that truck?

A. For the Chevy, yes.

Q. That was a Chevrolet truck? A. Yes.

Q. What type truck was that?

(Testimony of Mrs. Esther Remmaker.)

A. A small rack. It had a rack built right on the truck. It wasn't detachable.

Q. It wasn't a semi-trailer built right on?

A. No.

Q. Rather a long wheelbase? [79]

A. No, it was just a ton and a half truck.

Q. A ton and a half Chevrolet truck?

A. That's right.

Q. Your last entry there is May 8, 1947, is that right?

A. That's right.

Q. You also stated that it was usual for you to enter in the book notations when they were long loads, I believe you called them, or long hauls made?

A. That's right.

Q. As you did on the 20th of October, 1945?

A. That's right.

Q. Let me look at the page again, will you? Now, I see you have some of the entries on this page that have similar notations. You have one near the top of the page, "one load Reardon, Lolo". Is that the type of entry you mean?

A. That's right.

Q. You have one marked here, "horses". That is a little different type load. It was usually cattle?

A. Yes, usually cattle.

Q. You have one here marked "Hamilton" on this page?

A. That's right.

Q. You have one, "Missoula Orchards", and you have another marked, "Milwaukee"?

A. That was from the Milwaukee railroad.

Q. That is, the notation, "Butte" after "one



(Testimony of Mrs. Esther Rennaker.)

load P. Davis" [80] is typical after that type entry. is that right?           A. Yes.

Mr. Angland: I overlooked reading this to the jury, and I would like to do this at this time.

Court: Very well.

(Plaintiff's Exhibit 2A read to the jury.)

Q. Mrs. Rennaker, can you tell us what the various entries indicate, in these four columns where you have figures?

A. The first ones are the number of head, the number of cattle, and the second is the amount of the trip, and the third is the tax on it.

Q. What is the fourth—I see?

A. That is really the amount of the trip (indicating).

Q. There is really three columns rather than four, dollars and cents in the second?

A. This is dollars and cents in the second.

Mr. Angland: That is all.

#### Re-cross Examination

By Mr. Taylor:

Q. What is the last month you made an entry for any hauling by these trucks, Mrs. Rennaker?

A. By both, or either one of them?

Q. The first truck, the semi-trailer, I think the last entry was on the 27th of February?

A. Yes. [81]

Q. And then, from then on, did your husband still freight with the other truck?

(Testimony of Mrs. Esther Rennaker.)

A. The small one, yes.

Q. That went, as I understand you now—the last entry was on the 8th of May, 1947?

A. Yes.

Q. And from then on there was no trucking, is that it?      A. No.

Q. No trucking done by your husband?

A. No, he was out.

Q. He was out. Did your husband make more than one trip to Great Falls this last summer and fall?      A. What do you mean?

Q. Did your husband go to Great Falls?

A. You mean with trips?

Q. Go to Great Falls for anything, whether it was a trip or otherwise?      A. Yes, he went.

Q. That is what I was asking you. How long before the trucks were taken, the last truck was taken by Mr. Catrino, that your husband made this trip to Great Falls?      A. I don't know.

Q. You don't know. That is all.

Mr. Angland: That is all.

(Witness excused.) [82]

**JAMES B. RENNAKER,**

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

**Direct Examination**

**By Mr. Angland:**

Q. Will you state your name, please?

A. Jim Rennaker, James Rennaker.

(Testimony of James B. Rennaker.)

Q. James B. Rennaker, is that your full name?

A. That's my full name.

Q. Mr. Rennaker, where do you reside, in Missoula, Montana?      A. Missoula.

Q. You are the husband of Mrs. Rennaker who just testified?      A. Yes, sir.

Q. Are you the same James Rennaker that testified in this courtroom on March 13, 1946, in a case in which the United States charged Sam Catrino and John Reinhard with a violation of the Indian Liquor Laws?      A. Yes, sir.

Q. And were you subpoenaed into this court to testify in that case?

A. No, I was asked to come up here.

Q. You weren't served with any subpoena?

A. No.

Q. Were you placed under oath by the Clerk when you took the witness stand in that case? [83]

Mr. Higgins: Just a moment. To which we object, your Honor, the record is the best evidence of that.

Court: I will permit him to testify whether he was sworn. I will overrule the objection.

A. Yes.

Q. And you did take the witness stand and testify in that case?      A. Yes.

Q. Do you recall the testimony that you gave in that case, Mr. Rennaker?      A. Yes.

Q. At that time—did you hear that testimony read here in the courtroom yesterday afternoon?

A. I did.

(Testimony of James B. Rennaker.)

Q. You heard this read, Mr. Rennaker: "Are you acquainted with the Brunswick Bar? Yes, I am", and the next question, "Were you there October 20th of last year?" Answer, "Yes, I was." Was that true or was that false testimony?

A. False.

Q. Were you in fact in the Brunswick Bar on October 20, 1945? A. No.

Q. The next question was, "Do you recall any Indian, the boy who was on the stand testifying, coming in there that evening?" You answered, "Yes, sir". Did you see the Indian boy who had testified in that trial in the Brunswick Bar on that date? [84] A. No, sir.

Q. That was a false statement?

A. Yes, sir.

Q. The next question is, "Were you there about eleven o'clock," you answered, "Yes, sir." Was that true or false? A. False.

Q. The next question is, "Do you recall him coming up and having a conversation with you?" You answered, "Yes, sir." The next question is, "That evening?" You answered, "I do." Is that true or false? A. That is false.

Q. The next question is "Tell the jury what it was?" The answer is, "He asked me to buy him a quart of wine, and I says I cannot buy you any wine." Was that true? Did you have that conversation or not? A. No.

Q. You didn't? The boy did not ask you to buy

(Testimony of James B. Rennaker.)

him any wine that evening?           A. No.

Q. The next question is, "Where were you standing at the time this conversation took place?" The answer was, "The east end of the bar." Question. "Would that be a point near by the stove or phonograph?" The answer was, "It was." The question was, "From where you were standing, could you see the front door or the entrance door on the northwest corner of the bar?" [85] The answer was, "No." Was any of that testimony true?

A. No.

Q. Then, there is a question on page 54—just a minute, I believe I skipped one. Here on page 54 of the transcript there is a question, "Tell the Court and jury what the Indian did after you had this conversation?" Your answer to that was, "He came in and asked me to buy him a quart of wine and I said, 'No, I can't buy you any wine', and he came over to the bar and as the house was full of Mexicans, he asked this Mexican there to buy him this quart of wine and the Mexican got the quart of wine and then he turned around and handed it to the Indian and the Indian went out." Did you actually overhear that conversation, or was that false testimony also?           A. That was false.

Q. Now, on cross examination, Mr. Rennaker, I asked you—(interrupted)

Mr. Taylor: What page is that?

Mr. Angland: This will be on page 55.

Q. I asked you here, "You have been receiving evening calls?" Answer, "I do, my wife does."



(Testimony of James B. Rennaker.)

Question, "Where do you receive these calls?"

Answer, "At home." "Do you keep a record of these calls?" Answer is, "Yes, sir." Then you were asked, "Have you checked these calls to see what hauling you might have been doing on October 20th?" You answered, "Yes." The question is, "What hauling did you do on that day?" Answer is, [86] "I went to Post Creek that night."

Question, "What time did you leave?" Answer, "I left about six o'clock." Was that testimony true or false? A. False.

Q. You had not in fact checked your records to see what hauling you had done on that day?

A. No.

Q. You were asked, "For what purpose?", referring—strike that. The question was, "What time did you leave?" Your answer was, "I left about six o'clock." "For what purpose?" The answer was "A load of cattle." Question, "How many?" The answer was, "Nine or ten." "Where did you haul them?" The answer was, "To Roamer." "You went for the cattle or delivered them?" Answer, "Delivered them up there." Was that testimony about your going to Post Creek and delivering cattle to Mr. Roamer true or false?

A. False.

Q. At page 57, Mr. Rennaker, of the transcript—I am afraid I will have to refer back to page 56 to get this correct, you were asked here, "Have you ever had other Indians ask you to purchase for them?" Your answer was, "No, not that."

(Testimony of James B. Rennaker.)

Question is, "That is the only one?" Answer, "At other times I have had them ask me to buy for them." Question, "How many times?" Answer, "Five or six times." Question was, "You do recall this particular request?" Answer, "Yes, sir." Question was, "Who [87] was the Indian that made that request of you on October 20th of last year?" You answered, "He is sitting over there.", and you indicated at that time Pierre, is that right, the Indian boy who was in the courtroom?

A. That's right.

Q. Had he actually made a request of you on the evening of October 20, 1945? A. No, sir.

Q. Had you, in fact, ever seen Pat Pierre before that day in the courtroom?

A. No, I hadn't.

Q. You hadn't seen him before that?

A. No.

Q. Mr. Rennaker, when did you first hear of the case, if you recall, that had been filed against Sam Catrino and John Reinhard for violation of the Indian Liquor Law? Do you remember when you first heard about it?

A. Right after they got picked up.

Q. By that you mean right after they were arrested? A. Yes.

Q. Who told you about the case, if you remember? A. Sam did.

Q. Sam Catrino? A. Yes.

Q. Was any suggestion made or request made

(Testimony of James B. Rennaker.)

of you at the time [88] when Sam talked to you about the case?

A. He said I would be a good witness, make a good witness for him.

Q. For him?           A. Yes.

Q. Did you reply to his statement?

A. I had to.

Q. What was that?       A. I had to.

Q. Why did you have to?

A. He was financing me on trucks and I had to listen to him.

Q. Did Mr. Catrino tell you you had to listen to him?

A. He told me—he didn't say I had to, but he said, "You have got to testify for me."

Q. He said, "You have got to testify for me?"

A. Yes.

Q. Did he tell you how you were to testify?

A. He did.

Q. What is the story he told you you must testify to?

A. Well, he told me to get on the stand and say that an Indian asked me to buy him a quart of wine and I refused him, and the Indian went over and asked a Mexican to buy him a quart of wine and the Mexican bought him a quart of wine and handed it to the Indian and he went out.

Q. Now, did Mr. Catrino tell you that just once?

A. He told me several times.

Q. Was anyone else present when he told you how you were to testify?       A. No.

(Testimony of James B. Remaker.)

Q. Was John Reinhard present at any of the conversations you had with Mr. Catrino about the way you were to testify? A. Not then.

Q. By then, what do you mean, right after they were arrested?

A. It was after they were arrested when Sam asked me.

Q. Let us come down to a point near the trial, which as the record shows was held here on March 13, 1946. Now, shortly before the trial, did you have a conversation with either Sam Catrino or John Reinhard as to how you were to testify?

A. Well, Sam—Sam told me the first time what to testify to and then John, he come along and he says, "Will you be a witness for us, Jim?", and I says, "Of course, I will."

Q. John Reinhard you mean said that?

A. Yes. He asked me if I would be a witness. He didn't know if I knowed something about it, but Sam says, "He will be a witness for us."

Q. When was that, now? How long before the trial did that conversation take place, do you remember?

A. It was right after they was arrested.

Q. Shortly after they were arrested. What else was said at that time? [90]

A. Well, I told him I didn't know. I told Sam I didn't know whether I could remember that or not, and he says, "I'll jog your memory so you will know."

Q. Was your memory jogged?

(Testimony of James B. Rennaker.)

A. Several times.

Q. How many times?

A. I couldn't say how many, but six or eight, anyway.

Q. Between the latter part of October, 1945, and March 13, 1946?      A. That's right.

Q. And did Mr. Reinhard assist Mr. Catrino at any time in jogging your memory?

A. Not that I know of.

Q. Was he present at conversations that you had with Mr. Catrino about how you were to testify?

A. He was there when the last time Sam told me how to testify.

Q. When was that?

A. Just the day before the trial.

Q. Day before the trial?

A. Or the morning before the trial, I mean.

Q. You mean the morning of the day before the trial?

A. No, the morning the trial was on.

Q. Where did that conversation take place?

A. Brunswick Bar.

Q. Was anyone else present and heard the conversation other [91] than you, John Reinhard and Sam Catrino?      A. No.

Q. Just the three of you that heard that conversation?      A. That's right.

Q. What was said that morning at the Brunswick Bar—or first—strike that, will you. Had you seen Mr. Reinhard or Mr. Catrino before you went to the Brunswick Bar that morning?



(Testimony of James B. Remmaker.)

A. Well, Reinhard came down and asked me if I had a way to get up to the witness stand, and I told him I had my truck, and I says, "I will go up in the truck."

Q. Did you discuss anything else in your house that morning with Mr. Reinhard?      A. No, sir.

Q. You stated there was a conversation held between the three of you on the morning of the trial in the Brunswick Bar. Do you recall what was said at that conversation?

A. Well, I told Sam I didn't like to do that, and he said, "I'll give you a few shots of whisky", and he says, "You will be all right."

Q. Did he give you a few shots of whisky?

A. He did.

Q. Do you recall how many?

A. Four or five.

Q. Did you go over or review the story you were to tell when you got on the witness stand at that time? [92]      A. Yes.

Q. You reviewed that story with Mr. Catrino and Mr. Reinhard, did you, that morning?

A. That's right.

Q. Did you go into specific dates and where you were to be in the Brunswick Bar that evening?

A. That's right.

Q. You stated a little while ago you had not seen Pat Pierre before you came into the courtroom that day. What were you told about that?

A. They told me, Sam says, "Do you know Pat

(Testimony of James B. Rennaker.)

Pierre?", and I says, "No.", and he says, "You can tell them you did anyway".

Q. Mr. Rennaker, how much of an education have you had? A. I went to the second grade.

Q. Now, you have testified to a number of things you said were false. When you stated them on that witness stand on March 13, 1946, did you at that time know that they were false and believe them to be false. I mean, when you testified here on March 13, 1946, did you know then that those things were false? A. I did.

Q. Since an indictment was returned in this case, Mr. Rennaker, have you been contacted by either Mr. Catrino or Mr. Reinhard?

A. I don't know what you mean. [93]

Q. Well, there is an indictment now being tried that was returned against the three men sitting here, and the record would show that was returned March 13, 1948. Have you been contacted by either Mr. Catrino or Mr. Reinhard concerning the testimony you would give in this case since that time?

Mr. Higgins: Just a moment, to which we object, your Honor, on the grounds that this is something separate and apart from what is set forth in the indictment, and apparently they are going to attempt to show a subsequent offense, something subsequent to that which is charged in the indictment or in any of the counts of the indictment, and it isn't material to any of the issues here, as to whether Sam and John are guilty under count 1

(Testimony of James B. Remmaker.)

and count 2. or whether Reinhard and LaValley are guilty under count 3.

Mr. Angland: If the Court please, this would go to show motive and intent.

Court: On the question of intent, I think I will overrule the objection. You don't need to make any argument on it.

Q. Do you recall my question? A. No.

Q. Have you been contacted by either Sam Catrino or John Reinhard since this indictment was returned by the Grand Jury sitting in Great Falls last spring? A. With Sam, yes.

Q. By Sam? [94] A. Yes.

Q. Sam Catrino you mean? Have you had any conversation with Sam Catrino as to how you would testify in this trial? A. I did.

Q. What was your conversation—strike that. Do you recall when you had a conversation or conversations with Sam Catrino regarding that matter?

A. I had a lot of conversations with him since I come back from Great Falls.

Q. That is, when you say, "come back from Great Falls", you refer to your appearance before the Grand Jury sitting in Great Falls last March?

A. That's right.

Q. You have had a number of conversations with him since that? A. After that.

Q. Did these refer to how you were to testify in this case? A. That is what he told me.

Q. What was that?

(Testimony of James B. Rennaker.)

A. He was trying to get me to testify that he didn't make—force me to lie on the witness stand. He wanted me to get up here and tell the jury he didn't force me to lie on the witness stand.

Q. Was anybody else present during any of these conversations?

A. Nobody but me and Sam. [95]

Q. Where did you have the conversation, if you recall?

A. Well, we was in his bar and we was out on the road.

Q. What do you mean by out on the road?

A. Riding around.

Q. In whose car?           A. Sam's car.

Q. Catrino's car. Was any offer or inducement made to you if you would come in and testify in that manner?

A. He told me he would put me back in business after the trial was over if I would testify like that.

Q. Can you tell the Court and jury just what he wanted you to testify to in this trial, just what Mr. Catrino wanted you to testify to in this trial?

A. He wanted—I told you what he wanted me to testify.

Q. Tell me again, possibly I didn't get it all.

A. He wanted me to testify on the witness stand here that he didn't force me to lie on the witness stand.

Q. Anything else?

A. I don't remember now, no. He said for me to go up there and tell on the witness stand that

(Testimony of James B. Rennaker.)

he did not force me to lie and if I would do that, after the trial was over with, he would put me back in business.

Q. Was there anything else that he said that you can now recall?

A. He said if I did that, my sentence wouldn't—I wouldn't [96] be in no trouble or anything. They wouldn't give me very much of a sentence out of it, I might just get a suspended sentence out of the deal.

Q. Was the purpose of that to free Mr. Catrino and you take the sentence, is that the idea?

A. That's right.

Q. Was that program outlined to you by Mr. Catrino more than one time? A. That's right.

Q. Do you know how many times, Mr. Rennaker? A. I didn't keep track of them.

Q. Quite a number? A. Quite a number.

Q. Now, Mr. Rennaker, you were charged by indictment, you were charged with committing perjury in this court on March 13, 1946. weren't you?

A. That's right.

Q. You have already entered a plea of guilty to that offense, haven't you? A. I did.

Q. And you have been, as a result of that plea, held in the custody of the United States Marshal for the past few weeks? A. That's right.

Q. Awaiting sentence in that case?

A. That's right. [97]

Mr. Angland: You may cross examine.



(Testimony of James B. Rennaker.)

Cross Examination

By Mr. Taylor:

Q. How long have you known Mr. Catrino, Mr. Rennaker?      A. About eight years.

Q. About eight years. During that period of time, have you been intimately associated with him?

A. Ever since the first time I met him.

Q. That would be eight years?      A. Yes.

Q. What was the relationship, or the business, if any, that you were engaged in during that period of time?

A. I knowed Sam for going in and out of there ever since I moved to Missoula.

Q. You formerly lived just below Hamilton?

A. That's right.

Q. Before coming to Missoula, you lived near Hamilton?      A. That's right.

Q. For the past eight years you have lived in this community here, and you have been associated more or less with Mr. Catrino?

A. That's right.

Q. He was formerly in the restaurant business here? I say, before going into the Brunswick business, he was engaged in the restaurant business here, Mr. Catrino? [98]      A. No.

Q. What business was he engaged in?

A. He was a bar tender, tending bar here.

Q. Now, when did you first become associated with him in a financial way? In other words, when did he advance you money to buy trucks, if he did?

(Testimony of James B. Rennaker.)

A. Well, I was driving for Ray Darnell, driving his trucks in the business.

Q. Whose trucks?

A. Ray Darnell's. I was working for him. Then he sold out to McClung up here, and McClung, he thought I wasn't good enough to drive the truck, he got someone higher up than I was to drive his truck for him, so I went on for about four months. I went to work at the sugar factory, and I was working there and I put in, I think it was four months at the sugar factory. He came back and asked me to go driving truck for him again.

Q. That was Sam?           A. No.

Q. I am asking when did you first have business relations with Sam Catrino, wherein he loaned you money to buy trucks, or took security on your trucks?           A. Three years ago.

Q. That would be in 1945?

A. Somewheres in there.

Q. Was it before the 13th day of October, 1945. Mr. Rennaker? [99]           A. I don't remember.

Q. Do you have any recollection as to the month that he first advanced you a sum of money to buy trucks?

A. I don't know that. I ain't got the education to remember dates.

Q. A day or two after he was arrested, you say, you stated you were owing him money and that you had to testify for him. What would you say as to that? Your testimony was that you had to, that

(Testimony of James B. Rennaker.)

he was financing you. What did you mean by that statement?

A. He financed me on two trucks.

Q. Then, the question I previously asked you was when did he advance you that money? Was it before the 13th of October, and if so, how long before?

A. I don't remember that myself.

Q. But it was before the 13th of October, 1945?

Court: He says he don't remember.

A. I don't remember.

Q. He didn't remember how long before, as I understood him. I think you stated on your direct examination that he told you, Sam Catrino told you you would make a good witness for him, is that what he said?

A. Who do you mean by that?

Q. That Mr. Catrino, the defendant here, told you after his arrest that you would make a good witness for him. Is that [100] what he said?

A. The first time, yes.

Q. That was shortly after the arrest?

A. That's right.

Q. Where was that conversation had, Mr. Rennaker?

A. In his barroom.

Q. Now, were you in the barroom frequently or otherwise?

A. Practically in there every day.

Q. Practically every day. Over what period of time?

A. Just when I would come in off a trip somewhere.

Q. Did you make that your headquarters?

A. The biggest part of the time.

(Testimony of James B. Rennaker.)

Q. And after the arrest, he said you would make a good witness for him, is that correct?

A. That's right.

Q. That statement was made to you in the Brunswick, is that correct?      A. Yes.

Q. Then later on you say, or did you tell Sam, Mr. Catrino, that an Indian boy wanted you to buy some liquor and you didn't do it and he asked a Mexican. Did you tell Sam that?

A. No, I didn't.

Q. What did you tell him, Mr. Rennaker?

A. I told him I didn't know anything about it.

Q. What did he say then? [101]

A. He says I can tell you what to say.

Q. Did he tell you in the English language so you could understand him?      A. He did.

Q. When was that conversation had in which he told you?

A. Right when he told me about the trial.

Q. The same time?      A. Yes.

Q. That would be shortly after his arrest?

A. That's right.

Q. On the morning of the trial, that would be March 13, 1946, you had another conversation with him at the Brunswick, did you?

A. That's right.

Q. And at that time Mr. Reinhard was there, is that correct?      A. That's right.

Q. You say you went over the same thing, that an Indian boy wanted you to buy some liquor and

(Testimony of James B. Rennaker.)

you told him no and a Mexican boy bought the liquor?      A. That's right.

Q. You saw the Mexican boy give it to the Indian?      A. That is what I told then, yes.

Q. Were you in there on the night of the 21st of October, 1945?

A. I don't remember what day that is. [102]

Q. You don't remember any of those dates?

A. No.

Q. The testimony you gave in court was on March 13, 1946?

A. I don't remember when that was.

Q. You don't remember anything about that?

A. No.

Q. Well, anyway, after this trial—you remember when Sam and Mr. Reinhard were tried in this court for that sale?      A. Yes.

Q. You recall that, Mr. Rennaker. Was that in 1946?

A. I don't remember what the date was about. One thing I never did learn was the dates of things anyway.

Q. Well, anyway, after that trial, you and Mr. Catrino still had your business relationship, that is, you were owing him some money on the trucks?

A. Yes, I did owe him some money on the trucks.

Q. On both trucks, Mr. Rennaker?

A. Just on the one.

Q. And what kind of truck was it?

A. G.M.C.

Q. That was a mortgage, was it?



(Testimony of James B. Rennaker.)

A. That is the one he had the title of.

Q. Did he have a mortgage on the other truck? He had the title to one, and did he have a mortgage on the other? A. He had a lien on it. [103]

Q. How was that represented, in a bill of sale or chattel mortgage, or what?

A. I don't know that myself.

Q. Then sometime later he took those trucks from you, did he not? A. He did.

Q. Do you have any recollection now as to the approximate date he took the trucks from you?

A. No, I don't.

Q. Could you fix the date by taking the date of the trial in which you testified, March 13th, as a starting point? Could you tell about when it was with reference to that date?

A. No, I couldn't.

Q. I will ask you, Mr. Rennaker, if it was in the summer or fall of 1948?

A. It was in the spring of the year when he took the Chevy away from me.

Q. When did he take the other truck?

A. About a month, I would say, before.

Q. Would that be in the spring right after the trial, the spring following March 13, 1946, or was it the spring of 1947 or 1948?

A. I don't remember the dates.

Q. After he took the trucks—on up to the time he took those trucks from you, the relationship between you and Mr. Catrino [104] was friendly, was it not? A. It was.

(Testimony of James B. Rennaker.)

Q. When he took the trucks away from you, did your relationship toward him change?

A. It did.

Q. Did you make any statement to him as to what you intended to do as to retaliation for his taking the trucks?      A. I did not.

Q. Well, following the taking of the last truck from you, did you appear before the Grand Jury in Great Falls?      A. No, sir.

Q. Didn't you? Didn't you—you were asked that by counsel for the government as to whether or not you appeared before a Grand Jury?

A. I never appeared over there until, it was in the last month or so.

Q. You did appear last month, that would be the month of June, 1948?

A. I don't know dates. I ain't educated enough to know dates.

Q. Prior to your appearance—now, you recall you did appear before the Grand Jury at Great Falls?      A. Yes, sir.

Q. Before you went to the Grand Jury, did you have any conversation or make any statements to Sam as to what you would do unless he loaned you some money? [105]      A. No.

Q. Did you discuss money with him at all before you went to Great Falls?      A. No.

Q. Now, you testified here that you had, in the case that was tried on March 13, 1946, that you had fixed that date by virtue of the fact that you went to Post Falls. You told in the cross examination

(Testimony of James B. Rennaker.)

of that trial, according to this record, you fixed the date by reason of the fact you went to Post Falls?

A. Post Falls, what do you mean by that?

Q. Post Creek? A. Yes.

Q. Where is Post Creek with reference to Missoula? A. About 40 miles out of town.

Q. Forty miles. That is up on highway—(interrupted)

A. Up the other side of Mission.

Q. Did Sam know you had gone to Post Creek that day? A. No.

Q. Had you said anything to him about that?

A. No.

Q. Had he said anything to you about your saying you had been to Post Creek?

A. He told me I could tell where I made one of these short trips. [106]

Q. He told you that? A. Yes.

Q. Did you discuss with him that trip you made to Post Creek?

A. He asked me, "Can't you figure out some of these short trips you made so you could explain that up there in court?"

Q. At that time he told you, as you told the Court and jury here to say you were in his place of business that night and that an Indian boy wanted you to buy wine and you told him you wouldn't do it and you saw the Mexican, and he also told you to say that, if they questioned you about it, to say you had taken a short trip that day, is that correct? A. That's right.

(Testimony of James B. Rennaker.)

Q. Did he anticipate there would be some question about where you had been that day?

A. That is what we planned out, me and him.

Q. That is what he planned out for you to say?

A. Yes.

Q. The words, the testimony you gave with reference to Post Creek was your own idea, was that it?

A. He asked me if I knew of any short trips I could make, and that is what I told him.

Q. That was all discussed at the time that you say he told you you would make him a good witness?

A. Yes.

Q. Did he tell you then he was financing you and that you [107] would be obliged to be a witness, did he tell you that?      A. He did.

Q. He told you that in the same conversation?

A. He told me that several times before this trial ever come off that if I didn't listen to him, he would take the trucks away from me.

Q. Was that before or after the trial on March 13, 1946, that he made these statements to you?

A. I don't remember dates.

Q. But you will remember, Mr. Rennaker, whether it was before or after the trial, wouldn't you?      A. Before the trial, yes.

Q. The alleged offense was committed October 20, 1945, so it would be between that particular date and March 13, 1946?

A. It was before the trial. It is when he told me what to say.

(Testimony of James B. Rennaker.)

Q. On the very morning of the trial, you told the Court and jury, that you went to the Brunswick and you rehearsed this matter, talked it over so you could remember the story. Is that correct?

A. That's right.

Q. Had you previously, as you now state, discussed that matter in which he told you that you had to testify for him?

A. He didn't then, no.

Q. Didn't you want to testify for your friend, Mr. Catrino? [108]

A. I didn't exactly want to do it, but I knowed I had to or lose my outfit.

Q. Didn't you suggest to him you were in there that evening and this same Indian boy had tried to get you to buy liquor for him? A. I didn't.

Q. You didn't tell him that? A. No.

Q. Did you tell him where you had been on the 20th of October? A. No, I didn't.

Q. You didn't tell him you had been to Butte?

A. I didn't.

Q. You didn't say anything about that. Can you recall now approximately what date it was that you had the first conversation, when Sam told you, as you have stated, that you would make a good witness for him, how long after the 20th?

A. It was the next day after he got picked up.

Q. As I understand, the 20th was on Saturday, is that correct? And that he was, as you call it, picked up on Monday? A. Yes.



(Testimony of James B. Rennaker.)

Q. Was that right, Mr. Rennaker?

A. I don't remember whether it was Monday, Tuesday or Wednesday.

Q. But where were you when you had this conversation? [109]

A. Brunswick Bar.

Q. You had gone to his bar? He was operating that bar?

A. That's right.

Q. Did you discuss with him the arrest, or his being picked up, did you talk that over with him?

A. He told me he had got arrested.

Q. Had you known it at that time?

A. No.

Q. Did he tell you the charge placed against him or the reason he was arrested?

A. Yes, he told me.

Q. What did he say?

A. He said, "Johnny got arrested for selling a quart of wine."

Q. Did he say who sold it, whether he sold it or someone else sold it? Did he say anything about that?

A. No, there wasn't much said about that.

Q. Was it then in that conversation that he told you you would be a good witness for him?

A. That's right.

Q. And he made that expression, did he?

A. He did.

Q. He said you would be a good witness for him, is that correct?

A. That's right. The reason he said I would

(Testimony of James B. Rennaker.)

make a good witness was because I was in there every day. [110]

Q. You were there every day over a period of how long?

A. Ever since he bought them trucks for me.

Q. What?

A. Ever since the time he bought the trucks for me.

Q. That truck was bought how long before this conversation in October?

A. I don't remember that.

Q. You don't remember anything about that?

A. No.

Q. Do you remember how much you were owing Sam on the trucks?

A. I have got it all down in a receipt book.

Q. Was there any disagreement between you and Sam at that time as to the payment, that is, as I understand, he says you were to pay as you went along out of your hauling. You were to pay so much to Sam out of each trip you made in which you received compensation hauling cattle, or whatever you hauled, is that correct?

A. No, sir, the agreement we was to make was I had Daly's slaughter house hauling out there. He says, "You take what you make on the outside and I will take Daly's money for the payments on the trucks.

Q. Was there any misunderstanding or disagreement between you and Mr. Catrino about your applying the money you received for the Daly haul-

(Testimony of James B. Rennaker.)

ing to him on the payment for the truck? Did you quarrel with Mr. Catrino about that? [111]

A. No, sir.

Q. Did he claim you weren't paying him for what you received?

A. No, the only time we ever had any argument about it is when he refused to sign receipts for money given him, Daly's money.

Q. Was that before or after the 13th of March, 1946?

A. I don't remember that. That is when he took the trucks.

Q. That would be after the 13th of March, 1946, you had the quarrel with him at the time he took the trucks, is that correct?

A. No, I didn't have no quarrel with him at all.

Q. What was the disagreement?

A. I most generally took my receipts down and gave them to Sam. He went to Daly's and collected the money for his part, that is, his money to pay on the trucks. Then I would bring the receipt book up and he would sign a receipt showing just what he had got.

Q. At this particular time was some words exchanged between you and Sam about your not turning in on the Daly hauling the amount you had agreed to be applied on the indebtedness on which he had security of the trucks?

A. The only thing he done, he refused to sign receipts, and I went to Daly's myself and collected the money.

(Testimony of James B. Remaker.)

**Q.** Did you quarrel about that? Did you and Sam quarrel about it? [112]      **A.** No.

**Q.** But you do remember that you did have that misunderstanding to the extent you stated, and you went out to Daly's and collected the money for the hauling, is that correct?

**A.** The last two hauls I made.

**Q.** Did you turn the money over to Mr. Catrino?

**A.** No, I kept it.

**Q.** As a result of your keeping the money, did you have any quarrels later after that? Did he quarrel with you, or the two of you quarrel about your collecting this money and not turning it over to him?

**A.** I went to Sam and asked for it, and he told me, he says, "Anytime you get the chance and you need that money I have coming from Daly's," he says, "you go ahead and take it", and that is what I did, and the—(interrupted)

**Q.** At the time he took away these trucks—(interrupted)

**Mr. Pease:** Let him finish his answer. Your Honor, the witness was interrupted in his answer.

**Mr. Taylor:** I apologize, your Honor.

**Court:** The government will probably take a note on it and on redirect bring it out, so go ahead.

**Q.** You stated at the time he took away the last truck, you had a quarrel with him, or some misunderstanding about your paying him what you earned hauling for Daly's, is that correct? At the time he took the last truck? [113]

(Testimony of James B. Rennaker.)

A. Could I explain that?

Q. Yes, as far as I am concerned.

A. How come him to take the last truck?

Q. No, the question was: As I understood you to say, Mr. Rennaker, at the time he took the last truck from you, you and he had some misunderstanding about payments?

A. No, no misunderstanding was there at all.

Q. With reference to the disagreement you had about paying him what you received from Daly's, when was it he took the last truck?

A. That was after I lost my business and stuff.

Q. What do you mean, "lost your business?"

A. When he took the first truck, I lost Daly's hauling.

Q. Then later he took the second truck?

A. Later he come along and got a job up here hauling railings from Ovando, and I hauled around up around Helena and Great Falls and all around Butte and Dillon, and all over, and he also told the guy to collect the money. He had given me money enough only for expenses, and after that, after I financed my truck down here to Krable for \$300.00 to buy a new set of tires to put on, he says between the Main Motors they had this made up between them, they was going to get the truck, but I didn't know it.

Q. Then, following that, did you go and tell Sam you were going over and claim that he had procured you or asked you to [114] give false testimony?

A. No, sir.



(Testimony of James B. Rennaker.)

Q. Did you say anything about what you were going to do to him?      A. No, sir.

Q. Never said a thing about that?

A. No, sir.

Q. Now, I understand in your direct examination, that after this present indictment against Mr. Catrino and Mr. Reinhard was filed, that Sam came to you and tried to influence you as to the testimony you would give?      A. He did.

Q. Well, now, from the time—where were you living from the time this indictment was filed up to the present time?

A. I was living on 616 Ivy Street.

Q. Did you live at any time in Great Falls from the time the indictment was returned until a day or two ago?      A. Eighteen days.

Q. You were in Great Falls between what dates with reference to the trial of this case?

A. I don't remember that.

Q. You went to Great Falls, and you came back here after you went to Great Falls?      A. No.

Q. You stayed at Great Falls. And when did you return to [115] Missoula?

A. Last Thursday.

Q. Last Tuesday?      A. Thursday.

Q. Upon your return, where have you lived?

A. In jail.

Q. When you were in Great Falls, where were you living?      A. In jail.

Q. When, then, did he contact you and ask you to testify in this case and to get you to say he

(Testimony of James B. Rennaker.)

didn't force you to testify in that other case that was tried March 13, 1946?

A. That was before we had the hearing in Missoula to go in and plead.

Q. I beg your pardon.

A. That was before we had our hearing here in Missoula to give our plea.

Q. You were in Great Falls, were you not, from the—(interrupted)

A. And before I made my plea, plead guilty.

Q. You went over to Great Falls and appeared before the Grand Jury?      A. I did.

Q. And you remained in Great Falls from the time you went over there until last Thursday, then you returned here and you were in jail ever since, is that correct? [116]

A. That's right.

Q. Now, do you want us to understand that it was before you made your plea of guilty?

A. That is what I mean. We had this—(interrupted)

Q. The indictment was returned against you, was it, at Great Falls?

A. I don't know what you mean by indictment.

Q. Was some papers filed by the government charging you had given, in that case on March 13th, false testimony at the request of Mr. Catrino and Mr. Reinhard?      A. I don't think so.

Q. How did it happen you remained there from the time you went over for the Grand Jury until last Thursday?

(Testimony of James B. Rennaker.)

A. I went over there and plead guilty and couldn't get out.

Q. Now, before you went over there, before this matter was even brought up, did you tell Sam Catrino what you were going to do and demand that he give you a thousand dollars?

A. No, I didn't.

Q. Did you demand that he give you anything and state to him if he didn't, you were going over and tell the story or say that the testimony you gave in his hearing was false?

A. He offered me money, yes.

Q. I am asking you if you didn't tell him that he had taken your trucks away and that unless he gave you something, some money, you were going over and say that he procured you or induced [117] you to give false testimony in his trial that was had on the 13th of March, 1946?

A. I told Sam—Sam asked me something about that, yes.

Q. Sam asked you. What did he say, Mr. Rennaker, about that?

A. He says, "If I had knowed this case was coming up, I wouldn't have took the trucks from you."

Q. He said if he had known this case was coming up, he wouldn't have taken what?

A. Taken the trucks from me.

Q. From the time this case came up, you had

(Testimony of James B. Rennaker.)

spent your entire time either in Great Falls or in Missoula after last Thursday, is that correct?

A. That's right.

Q. When did he make that statement to you? In Great Falls or while you were in jail here in Missoula?

A. This is before I even went over and plead guilty.

Q. Had Sam and Mr. Reinhard been indicted before that? A. What do you mean by that?

Q. Had the papers been filed by the government? A. They was put under bonds.

Q. Charging that they had procured you to testify falsely. Was that filed before you had appeared before the Grand Jury or after?

A. After.

Q. From the time you appeared before the Grand Jury at Great [118] Falls, up to last Thursday, you were either in Great Falls incarcerated or incarcerated in the County Jail in Missoula, is that correct? I say you have been in jail all the time?

A. That's right.

Re-direct Examination.

By Mr. Angland:

Q. Do you recall being subpoenaed as a witness and your wife being subpoenaed as a witness over to Great Falls last March?

A. It was last March sometime. I remember us getting a subpoena to go over there. That is when I gave my plea.

(Testimony of James B. Rennaker.)

Q. A paper something like this (indicating) was served on you and your wife?

A. That's right.

Q. You appeared before a Grand Jury and told the story that you have been relating here in substance, is that right?

A. That's right.

Q. Then you returned to Missoula, is that right?

A. That's right.

Q. And here about six or seven weeks ago, I believe, you were called into this court and you entered a plea of not guilty, is that right?

A. That's right.

Q. And after that, about 20 days ago, you went to Great Falls and you entered a plea of guilty, is that right?

A. That's right. [119]

Q. Your attorney took you along and went over there?

A. That's right.

Q. You changed the plea you had entered here before. Between the time you appeared before the Grand Jury and the time you were called into this Court to enter your plea, you were free to go about your business, weren't you?

A. That's right.

Q. Did you know at the time you referred to Sam Catrino being on bond, did you know that he had been arrested after your appearance in Great Falls last March?

A. I did.

Q. You also knew a charge had been filed against you, didn't you?

A. I did.

Q. You knew you would be called on in Court and either plead guilty or not guilty to that charge,



(Testimony of James B. Rennaker.)

is that right?           A. That's right.

Q. So, you were in and about Missoula after the time the charge was filed against you, in Missoula until about 20 days ago?           A. That's right.

Q. That is the time you referred to having Sam contact you and talk to you about how you should testify during this trial, is that right?

A. That's right. [120]

Q. You said in response to a question by Mr. Taylor that you had not demanded a thousand dollars from Sam Catrino, but your answer was that he offered you some money?           A. He did.

Q. Do you remember how much he offered you?

A. Sam offered me two thousand dollars if I would take the rap.

Q. And by take the rap, what do you mean, if you will explain that to the Court and jury? Maybe some of the jurors don't understand.

A. If I would get up on the witness stand and swear he didn't force me to lie.

Q. If you would get on the witness stand and testify falsely in this case, he would give you \$2,000?           A. That's right.

Q. And you were to take the rap, in other words, you were to take the brunt of the charge?

A. That's right.

Q. What did you tell Sam when he made that offer to you?

A. I told him I didn't think that was money enough to serve time in Deer Lodge or somewhere.

(Testimony of James B. Rennaker.)

Q. You didn't think you wanted to go to the penitentiary for that price?

Mr. Higgins: We object to Mr. Angland injecting an answer. He said it wasn't enough money, and the District Attorney is [121] going to put in a new answer for him. He has been leading the witness all the way through.

Q. Did you tell Sam you wanted more money to do that?      A. No, I didn't.

Q. Did you tell him you would do as he requested for any given sum of money at all?

A. No, I didn't.

Re-cross Examination.

By Mr. Taylor:

Q. When you returned from Great Falls, you say, from the time you returned from Great Falls to the time you were arrested, you were in Missoula. Now, between what dates were you in Missoula?      A. I come in here last Thursday.

Q. But I am trying to have you tell the Court and jury when it was you had these conversations with Mr. Catrino and wherein Mr. Catrino was in Missoula. Now, when did you have these so-called conversations, one in which you said Sam offered you \$2,000 to take the rap, is that the expression he made?      A. That's right.

Q. He told you he would give you \$2,000 if you would take the rap?      A. That's right.

Q. Did you tell him that wasn't enough?

A. There wasn't very much said about that.

(Testimony of James B. Rennaker.)

Q. Well, now, when did you have the conversation with him in which he told you to take the witness stand and say—to get up on the witness stand and say that the testimony you gave was true or Sam didn't get you to testify? What did he tell you about that, Mr. Rennaker? What did he tell you, you would get \$2,000 if you would take the rap? Was there any rap in view at that time?

A. For me.

Q. Yes. When did you have the next conversation with him in which you stated he told you if you would get on the witness stand and testify that he didn't get you to give false testimony?

A. He told me that several times.

Q. Was that after your return from Great Falls?      A. Yes.

Q. You returned when?

A. I don't remember that.

Q. Do you know whether Sam was gone any part of the time of June or May or April? Was he here all the time?

A. He was gone when I went to Great Falls. He went to California or somewhere.

Q. When you returned from Great Falls, was he here? Had he returned from California?

A. It was the next day. It is after I got back from Great Falls. [123]

Q. You can fix that date. Where did you first see him after your return from Great Falls? Where did you meet up with him?      A. In his bar.

(Testimony of James B. Rennaker.)

Q. You went to his bar? A. Yes.

Q. That would be the Brunswick. And he had recently returned from California, he had just returned, is that correct? A. That's right.

Q. Was he away at the time you were in Great Falls? In other words, was Sam in California or on his way to California at the time you went to Great Falls, do you know?

A. I don't remember.

Q. Do you remember whether he had gone to California before you went to Great Falls?

A. I heard someone say he went to California, and that is all I know.

Q. Yes. After you returned from Great Falls, you went into the Brunswick, did you? I say, after you returned from Great Falls, you went into the Brunswick, that is, his place of business.

A. That's right.

Q. Did you enter a conversation with him in which he made the remarks that he would give you \$2,000 if you would take the rap?

A. That wasn't then. [124]

Q. What was said then?

A. It was before we was supposed to come up here and plead guilty was when he said it.

Q. When was that with reference to the time you had went to the Brunswick and after Sam had returned from California?

A. I can't remember dates.

Q. Could you fix the date with reference to your

(Testimony of James B. Rennaker.)

return from Great Falls this last time, last Thursday?      A. I counted the days I was in there.

Q. I could make it plainer this way: Was it before you went to Great Falls and appeared before the Grand Jury, was it before that?

A. That I was in jail?

Q. No, that you had this conversation with Sam in which you say—(interrupted)

A. It was after I came back.

Q. It was after you came back from Great Falls?

A. From the time they took me over there and put me in front of the Grand Jury.

Q. Yes. After you had come back from Great Falls, had the government made any charges that you had committed perjury or that Sam had procured you to commit perjury back in 1946?

A. Only they gave me a subpoena to go to Great Falls.

Q. That is the only paper the government had given you?      A. Yes. [125]

Q. After you got back, you went into Sam's place at the Brunswick?      A. I did.

Q. You say you didn't have this conversation that day?

A. He wanted to find out what I did do over there.

Q. That is different again. He asked you if you had been to Great Falls?      A. Yes.



(Testimony of James B. Rennaker.)

Q. Did he say he had been away and just returned, anything to that effect?

A. In fact, I knowed he was gone.

Q. Did you talk that over at the first conversation you had with Sam about your being at Great Falls?

A. He wanted to find out what I did say in Great Falls.

Q. I will ask you, Mr. Rennaker, if you know whether Sam knew you had been in Great Falls, did he know you had been in Great Falls?

A. He did.

Q. So, he didn't leave for California before you went to Great Falls?

A. Yes, he was in California.

Q. But he knew you had been in Great Falls?

A. He knew it when I got back.

Q. When you got back, that was the morning you went to the Brunswick, isn't it? [126]

A. That's right.

Q. At that time, no statement was made by Sam, or the statement you say he did make, that he would give you \$2,000 to take the rap, wasn't talked about?      A. No.

Q. When did you first talk about that?

A. Just before I went to Great Falls to plead guilty.

Q. That is before you and your attorney went to Great Falls?      A. That's right.

Q. Have you any independent recollection now

(Testimony of James B. Rennaker.)

of the approximate date? Do you know the month it was in, Mr. Rennaker?

A. I don't know.

Q. Do you know the week?

A. I don't know.

Q. But in any event, you say Mr. Catrino was here in Missoula? A. That's right.

Q. Where was that conversation had?

A. In the car, his car.

Q. Where was the car with reference to any buildings or objects that we might identify? Was it near the Brunswick?

A. I don't remember that.

Q. Do you remember the time of day?

A. No, I don't.

Q. Were you and Sam at the time in friendly terms? [127] A. Yes.

Q. You had renewed your friendship after the break you had when he took the last truck from you? A. Yes.

Q. You renewed your friendship then with Sam? A. Yes.

Q. Had he loaned you any money or assisted you? A. He never loaned me money, no.

Q. He never loaned you any money from the time he took the last truck from you, is that correct? I say, he didn't advance you any money or loan you any from the time he took the last truck to the time you met him out in the automobile after

(Testimony of James B. Rennaker.)

you had returned from Great Falls? Is that correct, Mr. Rennaker? You should know that.

A. I'll admit he has given me money to live on.

Q. He gave you money? A. Yes.

Q. When did he give you money, Mr. Rennaker?

A. When he was trying to tell me this stuff to tell on the witness stand.

Q. Do you want the Court to understand he was trying to get you to tell something?

A. He wouldn't have given me money if he didn't want me to tell something.

Q. Is that a conclusion you have drawn or anything he had [128] stated? Did you feel that way, or did he tell you that? A. He told me that.

Q. He told you that. And notwithstanding the fact he gave you money right along and you turned on him, did you, that is, you went over to Great Falls and testified before the Grand Jury that Sam —(interrupted)

Mr. Angland: Just a minute. I will object to that last question, your Honor, as argumentative.

Court: Yes, I think we are descending into argument and repetition, a good deal of it. We will take time to cool off for a couple of hours.

(Whereupon, at 12:00 o'clock, noon, July 8, 1948, a recess was taken until 2 o'clock p.m., same day, at which time the following proceedings were had:)

(Testimony of James B. Rennaker.)

Mr. Angland: If you have no further cross examination, I have no further examination of this witness.

Mr. Taylor: Nothing further.

Court: Very well.

(Witness Excused)

JOHN I. ROMER,

called as a witness on behalf of the plaintiff,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland: [129]

Q. State your name, please.

A. John I. Romer.

Q. Where do you reside, Mr. Romer?

A. I live in Orchard Homes.

Q. Where did you reside on October 20, 1945?

A. On Post Creek.

Q. Post Creek, Montana?

A. That's right.

Q. About 35 or 40 miles from Missoula?

A. 53 miles north of Missoula.

Q. In what business were you engaged on October 20, 1945, at Post Creek, Montana?

A. Farming.

Q. And stock raising?

A. More or less diversified farming. I had cattle, Herefords and dairy cattle.

Q. On October 20, 1945, were you acquainted

(Testimony of John I. Romer.)

with Mr. James B. Rennaker, who has testified in this case?      A. Yes, I was.

Q. On that date, October 20, 1945, did Mr. Rennaker haul any cattle for you from Missoula, Montana, to Post Creek, Montana?

A. No, he did not.

Q. Did he haul any for you near that date?

A. I think he hauled cattle for me on April and in May, 1945, and then in January, 1946. [130]

Q. He didn't haul any near the date October 20, 1945?      A. No.

Mr. Angland: You may cross examine.

Mr. Taylor: No cross examination.

(Witness Excused)

LEONARD LYTLE,

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland:

Q. State your name, please.

A. Leonard Lytle.

Q. Mr. Lytle, where do you reside?

A. Out at Missoula Livestock Auction, State of Montana.

Q. Where was that?

A. Out here, Missoula Livestock Auction Company, State of Montana.



(Testimony of Leonard Lytle.)

Q. I believe that is the name of the concern, is that right?      A. Yes.

Q. You are employed by the State of Montana?

A. Yes.

Q. In what capacity are you employed by the State of Montana?      A. Brand Inspector.

Q. As the Brand Inspector for the State of Montana at the [131] Missoula Livestock Company, do you have in your custody the official records of the brands inspected by the State of Montana at the Missoula Livestock Company on October 20, 1945?

A. I got them for the month of October.

Q. 1945?      A. Yes.

Q. Will you look, please, at the record for October 20, 1945? Those are the official records that you have with you, are they?

A. That's right, going out, all cattle trucked out of the yards.

Q. They are official records of the State of Montana?      A. That was for October 20th?

Q. Yes.      A. What for, who for?

Q. For Parke Davis.

A. 25 head going to Butte, Montana.

Q. Just a minute, Mr. Lytle, let me ask you a question. You have with you the official record of inspections made for Parke Davis on October 20, 1945, do you?      A. Yes.

Q. That is the official record of the State of Montana?      A. Yes.

(Testimony of Leonard Lytle.)

Q. I will call your attention, Mr. Lytle, to Plaintiff's Proposed Exhibit 3, and ask you if that is the inspection made for Parke Davis on October 20, 1945? [132]

A. That is for truck, you know, that is for cattle shipped by truck.

Q. Shipped out from the Missoula Livestock Company to what point in the state?

A. Butte, Montana.

Q. To Butte, Montana. And what does that record show?

A. Shows how many cattle we shipped over. It was trucked over, left the yards, how many cattle loaded at Missoula and went to Butte.

Q. How many cattle were loaded in Missoula and shipped to Butte?      A. 25 head.

Mr. Angland: You may cross examine.

Mr. Taylor: No cross examination.

Mr. Angland: This witness would like to be excused permanently, if **there is no objection.**

Court: How about the record, what did you do with the record?

Mr. Angland: I didn't offer that in evidence, your Honor. I didn't feel it was necessary to offer the record as long as the witness testified about it.

Court: All right.

(Witness Excused) [133]

FRED A. GREENFIELD,

called as a witness on behalf of the plaintiff,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland:

Q. Will you state your name, please?

A. Fred A. Greenfield.

Q. Where do you reside, Mr. Greenfield?

A. 1244 Monroe.

Q. Missoula, Montana? A. Yes, sir.

Q. Were you residing in Missoula, Montana, October 20, 1945? A. I was.

Q. Where were you employed at that time?

A. For the City of Missoula Police Department.

Q. You were a police officer for the City of Missoula on October 20, 1945? A. Yes, sir.

Q. Were you on duty as a policeman in the evening of October 20, 1945? A. I was.

Q. Are you the same Fred A. Greenfield who testified in this Court on March 13, 1946, in the case of United States vs. Sam Catrino and John Reinhard? A. I am. [134]

Q. Mr. Greenfield, do you recall where you were on duty on the evening of October 20, 1945, in the City of Missoula? A. Yes, sir.

Q. And were you in the vicinity of the Brunswick Bar on that evening? A. I was.

Q. Were you present when the Indian, Pat Pierre, entered the Brunswick Bar?

A. Yes, sir.

(Testimony of Fred A. Greenfield.)

Q. Where were you at that time?

A. I was on Woody Street right on the corner of Woody and West Railroad at the Keith Store, hotel and store combined. It is in the 600 block on Woody Street.

Q. Will you state to the Court and jury what you observed when you were in that place?

A. Well, I started my beat at ten o'clock—  
(interrupted)

Q. Ten o'clock p.m.

A. Ten o'clock p.m., yes, sir, and I changed my beat every night, which was routine, and I was trying doors, and I tried the last door before I got to the hotel door, and was just checking the door at the Keith Store on West Railroad and Woody Street when a car came on West Railroad traveling at a rate of speed. Wondering why all the speed, I stopped and observed **this car, and pretty soon he stopped and backed up on the Northeast curb of Railroad, which is rather a high curb, and turned it around and parked it at the Brunswick Bar.**

Q. Parked at the curb near the Brunswick Bar?

A. Yes.

Q. Proceed.

A. And wondering why all the haste, I crossed the street to the Brunswick Bar. An Indian boy had gotten out of the car and run into the Bar. I see this boy standing at the bar, and I was looking him over, observing everything, his actions, and I

(Testimony of Fred A. Greenfield.)

see this transaction take place.

Q. What transaction, Mr. Greenfield?

A. Well, there was a transaction taking place there of a bottle, and what it contained, at that time I didn't know until—(interrupted)

Q. Let us go into this. You saw a transaction involving a bottle between what persons?

A. Johnny Reinhard and Patrick A. Pierre.

Q. And that transaction was taking place in the Brunswick Bar? A. Yes, sir.

Q. Near the bar or the middle of the room, or where was it taking place?

A. It took place at the bar.

Q. At that time, where were you?

A. I was standing in the doorway, the north-west doorway on Railroad Street. [136]

Q. Standing in the doorway or entryway into the Brunswick Bar? A. Entranceway, Yes.

Q. Did you see Sam Catrino in the bar then?

A. I did.

Q. Were you acquainted at that time with James B. Rennaker?

A. I had never met the man. I knew who he was.

Q. Did you at that time know who he was?

A. Yes.

Q. Did you observe the persons in the bar that night? A. I did.

Q. Was James B. Rennaker in the Brunswick Bar that night?



(Testimony of Fred A. Greenfield.)

A. That night, no, he wasn't.

Q. Had you on occasion prior to that time seen James B. Rennaker in the Bar?      A. Yes.

Q. Did you know what business Rennaker was engaged in?      A. I did.

Q. And Mr. Greenfield, you stated you saw a transaction involving a bottle between John Reinhard and Pat Pierre. Now, will you state what you observed?

A. This Indian boy put his hand in his pocket and laid something up on the bar. I later seen the cash register rang up, and the boy started away from the bar, and I stepped out of the entranceway and went over by his automobile, and the boy came out, and as he came out of the entryway, he headed east where the car was just around from the entrance. He came on the run, and when he seen me there, he started to stop and turn around and headed west on Railroad. I ordered him to stop and he did, and I walked up to him and asked him what his name was and he told me freely. I asked his age and he told me that freely.

Q. What did he state his age was?

A. 17 years.

Q. Did you take anything from the boy then?

A. I did.

Q. What did you take from him?

A. I took a bottle of wine away from him.

Q. That was the bottle of wine introduced in

(Testimony of Fred A. Greenfield.)

the case tried in this court on March 13, 1946 as evidence in that case?       A. Yes, sir.

Mr. Angland: You may cross examine.

Cross Examination.

By Mr. Higgins:

Q. How were you attracted to the car that the boy drove up there that evening?

A. The reckless manner in which he operated the vehicle.

Q. Where did he park the car in reference to where you were?

A. He backed up on to Woody Street, came across the intersection and backed up on to Woody and West Railroad. There is [138] a high curb there running along the railroad track. It is quite a drop, and one hind wheel went up on the curb, and I was sure he was going to go over the curb, and he cut it around and came on and parked just east of the entrance of the Brunswick Bar.

Q. Was he intoxicated at that time?

A. I wouldn't say he was intoxicated, he had been drinking.

Q. What, if anything else, was in the car when you arrested him and took the wine from him?

A. There was.

Q. What was it?

A. A bottle of whisky and a bottle of wine.

Q. Did he tell you he had walked up to the bar, that is from town?       A. No.

Q. Did he admit driving that car up there?

(Testimony of Fred A. Greenfield.)

A. He did not.

Q. What did he say about driving the car up there?

A. May I give this testimony as it was, as it happened, about the car?

Court: Just go ahead and tell the facts.

A. He parked the car, and when he came out, I asked him his age and his name, and he told me all this, and then I asked if he had a driver's license. He answered me, "Yes," and I asked him for it. He gave me the driver's license and what he told [139] me corresponded with the driver's license which he was possessed of then. I asked him if that was his automobile, and he said, "No." I said, "You drove it up here." "No," he says, "I didn't drive it up here," and I was standing and looking at his license, and I says, "Pat, you did drive it up here." "No, I didn't," he said, "I walked," he says, "I don't know anything about this automobile." So, I told him, I says, "Pat, I will have to put you under arrest for possession of a stolen automobile." I took him to the Northern Hotel and called the squad car.

Q. Did you take him to the police station?

A. Yes, sir.

Q. When you arrived at the police station, did you find out that during the time when you had first seen Pierre come up with the car, that this car had been reported stolen?

Mr. Angland: Just a minute, to which we ob-

(Testimony of Fred A. Greenfield.)

ject, your Honor, as being immaterial, not competent in the trial of this case, not proper cross examination, as well as beyond the scope of direct.

Court: I don't know. He is talking about driving the car up there and parking it east of the bar, going in and coming out, and following him to the car and standing there. I think he has gone into the details of what was in the car, what he did, what he was doing, how he came into possession of the car, it is all part of the case. Go ahead. [140]

A. I took him to the police station, and on arrival at the station, I was informed that this automobile was stolen by the desk sergeant, so after he was booked, I told the desk sergeant I was going back up on Woody Street and Railroad to get the car, which I did. I brought the car to the station, removed the whisky and wine and the keys out of it, and shortly the owner of the automobile came into the station. He was notified during the time I left the station to go back after the car.

Q. There is no question in your mind, is there, that that was the car Pierre drove up that evening?

A. No, sir. It was definitely the car he drove up.

Q. You say there was another bottle of whisky and bottle of wine in that automobile?

A. That's right.

Q. Did Pierre, after you got him to the police station, maintain he had never driven that car up there?

A. Yes, sir.

(Testimony of Fred A. Greenfield.)

Q. When he drove up to the Brunswick Bar, did he park with the motor running?

A. Yes, sir.

Q. And jumped out and ran around into the bar?      A. Yes, sir.

Q. And likewise came out on the run, did he?

A. Yes, sir. [141]

Q. When he saw you, what did he try to do?

A. Tried to run in the opposite direction from me.

Q. Toward the car or away from the car?

A. Away from the car.

Q. He told you he didn't know anything about the automobile you had saw him get out of?

A. Yes, sir.

Q. Well, the next morning, did the Indian police come to the police station and interview Pierre that you know of?

A. I was called to the station the next morning around about ten o'clock.

Q. And was there anything done with the theft charge of the automobile with Pierre?

A. No, sir.

Q. What was done with it?

A. I asked the gentleman that owned the car if he would sign a complaint—(interruption)

Court: I think you have pursued this line of testimony far enough.



(Testimony of Fred A. Greenfield.)

Mr. Higgins: That is all.

Mr. Angland: Nothing further.

Court: You are excused.

(Witness Excused) [142]

PATRICK PIERRE,

called as a witness on behalf of the plaintiff,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Angland:

Q. Will you state your name, please?

A. Patrick Pierre.

Q. Where do you reside, Mr. Pierre?

A. Camas Prairie, Montana.

Court: What place?

A. Camas Prairie.

Q. Are you a ward of the United States Government?      A. I am.

Q. Enrolled on the census rolls of the Flathead Reservation?      A. Yes.

Q. And what is your age, Mr. Pierre?

A. Nineteen.

Q. What was that?      A. Nineteen.

Q. Nineteen?      A. Now, yes.

Q. How old were you on October 20, 1945?

A. Sixteen, or fifteen. No, sixteen, 1945, 1948, sixteen.

Q. And are you the same Patrick Pierre who testified in this court on March 13, 1946, in the

(Testimony of Patrick Pierre.)

case of United States vs. [143] Sam Catrino and John A. Reinhard?      A. Yes.

Q. Now, before the trial of that case on March 13, 1946, had you ever seen either Sam Catrino or John Reinhard?      A. Yes.

Q. Do you recall the evening on which you were taken to the City police station by Mr. Greenfield?

A. No, I don't.

Q. Well, did you make a purchase of some wine in the Brunswick Bar on October 20, 1945?

A. Yes.

Q. Who did you buy it from?

A. Johnny Reinhard.

Q. Was Sam Catrino in the bar when you bought it?      A. I don't recall.

Q. After you bought that wine from John Reinhard on October 20, 1945, did you see John Reinhard again?      A. Yes, I did.

Q. Where did you see him?

A. Plains, Montana.

Q. Where?      A. Plains, Montana.

Q. Do you recall about how long afterwards that was?      A. No, I don't.

Q. Well, was it before Christmas of that year?

A. I believe it was.

Q. Would it be in the month of December?

A. I don't recall the month, but I think it was before Christmas.

Q. And you saw Mr. Reinhard at Plains, Montana. Who was with him at that time?

A. I didn't know this fellow that was with him.

(Testimony of Patrick Pierre.)

Q. Do you know him now, do you see him in the courtroom?

A. Well, I didn't recognize him.

Q. You don't know any of the three gentlemen here? Were any of them with Mr. Reinhard?

A. I don't believe I could recognize him now.

Q. Was anyone else with them, with Mr. Reinhard? A. No, just two.

Q. Was Fred Old Horn along? A. Yes.

Q. Then there were three? A. Three.

Q. And did you have any conversation with John Reinhard at Plains, Montana?

A. Yes, I did.

Q. Were the three persons, John Reinhard, the person you don't recognize, Fred Old Horn, and you, were you all present? A. Yes, we were.

Q. What was the conversation you had with John Reinhard? [145]

Mr. Higgins: We shall object to that testimony in behalf of Mr. Catrino, the defendant Catrino, unless—(interrupted)

Court: Very well, he is not present, evidently, so, of course, it doesn't have any bearing as far as he is concerned.

Mr. Taylor: We feel at this time, if the Court please, the testimony, while it was not admissible as to Mr. Catrino, notwithstanding that fact, it would be prejudicial on the two counts in which he is an alleged defendant.

Court: I don't think so. This is an entirely dif-

(Testimony of Patrick Pierre.)

ferent offense, isn't it? This is the third count of the indictment.

Mr. Higgs: Apparently it is the third count, and for that reason we object on the part of Catrino.

Court: Objection overruled. Proceed with the examination of the witness.

Q. Now, Mr. Pierre, do you recall my last question? A. Yes.

Q. Can you answer that question?

A. Well, we talked about the time I bought the wine in the bar at the Brunswick Bar.

Q. Yes. What was said?

A. Well, we were to come to Missoula, and I was supposed to make a statement on that.

Q. You will have to speak just a little louder, Mr. Pierre. You were to come down to Missoula and make a statement?

A. To Reinhard's lawyer or attorney here. [146]

Q. You were to come down and make a statement to Reinhard's lawyer? A. Yes.

Q. What was that statement to be?

A. I was to come down here and make out a statement and sign it saying that I got the wine from a Mexican in the bar.

Q. Were you offered anything if you would come to Missoula and make that statement?

A. Yes.

Q. What were you offered?

A. One hundred dollars.

(Testimony of Patrick Pierre.)

Q. Was there anything else said during that conversation that you now recall?

A. No, I guess not.

Q. Were you told who would give you the hundred dollars?      A. No.

Q. And did you go to Mr. Reinhard's lawyer and make that statement?      A. No, I didn't.

Q. Did you take the hundred dollars?

A. No, I didn't.

Q. Was there any discussion during that conversation concerning Mexicans, Mr. Pierre?

A. Well, yes.

Q. What was said, if you recall? [147]

A. I was to testify that there was a lot of Mexicans in the bar that night that I bought the wine.

Q. Was there something else you were going to say about that?      A. Yes.

Q. What else?

A. They also told me to say that I asked for the wine in the Mexican language.

Q. Do you know the Mexican language?

A. No, I don't.

Q. Do you know any Mexican words at all?

A. No.

Q. Were you told what words to use?

A. I was told, but I don't know what they are now.

Q. You don't know now what they were?

A. No.



(Testimony of Patrick Pierre.)

Q. Did the other man with Mr. Reinhard, not Fred Old Horn, but the other man, did he say anything to you?

A. No, he didn't, I don't recall.

Mr. Angland: You may cross examine.

Cross Examination.

By Mr. Taylor:

Q. Do I understand you to say, Mr. Pierre, that you don't recall going to the police station on the night of the 20th of October?

A. I do recall that. [148]

Q. I beg your pardon?

A. I recall going down there.

Q. You recall you were taken, or you recall you went to the police station?      A. Yes.

Q. Do you recall an officer apprehending you as you came out of the Brunswick?      A. Yes.

Q. And did you run away from him?

A. I don't remember running.

Q. I beg your pardon.

A. I don't remember running.

Q. You don't remember running?      A. No.

Q. Do you remember of driving up to the Brunswick in an automobile?      A. Yes.

Q. Did you drive the car?      A. Yes.

Q. That the officer talked to you about?

A. Yes.

Q. Where did the officer pick you up, as you came out of the bar, or across the street?

(Testimony of Patrick Pierre.)

A. No, as I came out of the door.

Q. As you came out of the door? [149]

A. Yes.

Q. You didn't attempt to go in the opposite direction, did you?      A. I don't remember.

Q. Were you intoxicated?

A. I had quite a few drinks.

Q. Quite a few drinks?      A. Yes.

Q. But after you got to the police station, do you recall anything being said about the automobile by the officer?      A. No.

Q. Do you recall you told the officer, or said anything to the officer up at the Brunswick where you had parked the car that you didn't drive that car?      A. Yes.

Q. Do you recall that?      A. Yes.

Q. Did you tell the officer you didn't drive the car up there?      A. Yes.

Q. Had you driven the car?      A. Yes.

Q. But you told him you didn't?

A. That's right.

Q. You think it was sometime about, around Christmas time or before that you saw Mr. Reinhard?      A. Yes, I did.

Q. And I think you stated it was at Plains?

A. I didn't live at Plains.

Q. But you say you saw him there?

A. Yes.

Q. Where did you live at that time?

(Testimony of Patrick Pierre.)

A. I was up at Duprees Company at Dog Lake.

Q. Duprees. That is between Plains and Hot Springs, Camas?      A. Yes.

Q. What time of day did you meet them?

A. It was after dark, I don't remember the time.

Q. Where did you meet them?

A. About a mile out of Plains.

Q. About a mile out of Plains?      A. Yes.

Q. Had you had an arrangement to meet them?

A. No, I hadn't.

Q. How were you, in a house or on the road?

A. No, I was driving a car.

Q. You were driving an automobile?

A. Yes.

Q. Anyone with you?      A. No, I was alone.

Q. Were you going toward Plains?

A. I was going home. [151]

Q. You were going home?      A. Yes.

Q. How were they travelling?

A. They had an automobile.

Q. They had an automobile?      A. Yes.

Q. You recognized Mr. Reinhard?

A. Yes.

Q. But you didn't recognize the other man?

A. No.

Q. Where did this Old Horn, as you call him, Fred Old Horn?      Yes.

Q. Was he with you or them?

A. He was with Reinhard.

(Testimony of Patrick Pierre.)

Q. With Reinhard? A. Yes.

Q. There were three of them in the Reinhard car? A. Yes.

Q. Who was driving the Reinhard car?

A. Reinhard.

Q. Reinhard driving the car? A. Yes.

Q. Did he overtake you?

A. No, I happened to be parked along side the road when they came down. [152]

Q. Was it dark? A. Yes, just dark.

Q. About what time of the day would you say, Mr. Pierre? A. I can't recall the time.

Q. It was after the sun had gone down?

A. Yes.

Q. Did you have lights on? A. Yes.

Q. Did they have lights on? A. Yes.

Q. Did you see the car as it overtook your car, or approached your car, did you see it following you or coming along the road? A. Yes.

Q. The car stopped, did it? A. Yes.

Q. And did all three of the men get out of the car? A. No, they didn't.

Q. Who got out of the car?

A. Fred Old Horn.

Q. Fred Old Horn got out of the car?

A. He was with Reinhard.

Q. At that time did you know Reinhard was in the car? A. No, I didn't.

Q. You didn't know? A. No. [153]

(Testimony of Patrick Pierre.)

Q. Old Horn got out. Did he come over to your car?           A. Yes.

Q. Did he talk to you?           A. Yes.

Q. Later what did you do, if anything?

A. I got in Reinhard's car.

Q. You got in Reinhard's car?           A. Yes.

Q. Was this other occupant of the car in the car when you got in?

A. There were three of them after.

Q. When you got in there were three?

A. No, when I got in, there were four.

Q. You say you can't identify the third man?

A. No.

Q. You can't identify him?           A. No.

Q. In what seat were you in the car?

A. Right side in the hindseat.

Q. Who was on the left side in the hind seat?

A. Fred Old Horn.

Q. Where was Mr. Reinhard?

A. Driving the car.

Q. He was sitting in the front seat?

A. Yes, on the left. [154]

Q. This other man you cannot identify was on the left side of Mr. Reinhard?

A. On the right side of Mr. Reinhard.

Q. The right side of Mr. Reinhard?

A. Yes.

Q. Then the conversation occurred you related here, that is, Mr. Reinhard wanted you to come to town and make a statement about what you



(Testimony of Patrick Pierre.)

knew or what occurred on the night of October 20, 1945?      A. Yes.

Q. Did you remember at that time what did occur on the night of October 20th?

A. I knew what happened.

Q. Your mind was vivid, that is, you had a vivid recollection of what took place, except you didn't remember that the officer—that you ran away from the officer?

A. I don't believe I ran away from him.

Q. You don't believe you ran away from him?

A. No, I don't.

Q. You say Mr. Reinhard first wanted you to come to Missoula and make a statement as to what took place on October 20, 1945, is that correct?

A. Yes.

Q. What was the words he used to you, Mr. Pierre?

A. He told me to go down there and tell his lawyer that I bought the wine in this bar from a Mexican. [155]

Q. I thought you stated that he first told you he wanted you to go down to Missoula and make a statement as to what took place on the night of October 20, 1945?      A. Yes.

Q. Well, now, did he say that to you, Mr. Pierre?

A. He said that much, but he also said—(interrupted)

Q. Well, now, we will come to that, but he did

(Testimony of Patrick Pierre.)

tell you he wanted you to go to Missoula and make a statement to his lawyer as to what occurred insofar as you were concerned on the night of the 20th of October, 1945, is that correct?

A. That's right.

Q. Yes. Then later you say—withdraw that question. Was there further conversation qualifying that or anything?

A. Yes, there was.

Q. What was the conversation?

A. He told me to testify that there was a lot of Mexicans in the bar the night I bought this wine from him.

Q. What will you say as to that? Were there any Mexicans in the bar? A. No.

Q. You are quite satisfied as to that?

A. Yes.

Q. Had you been drinking on the night of October 20th? A. Yes. [156]

Q. Had you driven rapidly up to this bar?

A. Yes.

Q. Drive pretty fast? A. Yes.

Q. Did you run on to the curb or anything of that kind? A. Yes.

Q. You jumped out of the car and ran into the Brunswick?

A. The car wasn't on the curb when I got out, I don't think it was.

Q. You don't think it was. But in any event.

(Testimony of Patrick Pierre.)

from where the car stopped, did you go, run, or travel rapidly from the car to the Brunswick?

A. I don't believe I ran.

Q. You don't believe you ran. Coming out, did you run? A. No, I don't think so.

Q. You didn't drive the car back to the police station, did you? A. No.

Q. Nor did the officer? A. Not then, no.

Q. You walked to the police station, did you?

A. I believe we went in the police car.

Q. You believe, do you know, Mr. Pierre?

A. In the police car, patrol car.

Q. In the patrol car? A. Yes. [157]

Q. Did you tell the officer you didn't know anything about that car? A. At that time, yes.

Q. At that time? A. Yes.

Q. But at the same time you knew you drove that car up there? A. Yes.

Q. All right. Now, you say that he told you that night that he would give you a hundred dollars?

A. The night he come up to see me.

Q. Yes, at plains. A. Yes.

Q. He met you about a mile from Plains, is that it? A. Yes.

Q. Why didn't you take the money, didn't you want it? A. I didn't want it that bad.

Q. Had you ever been in any trouble before this with the law? A. Not before then.

Q. That is the first time you had ever come in contact with the law? You want the Court to

(Testimony of Patrick Pierre.)

understand that?      A. Yes, at the time.

Q. Have you lived all of your life in Camas Prairie, Camas Hot Springs?

A. I lived a few years in Hot Springs. [158]

Q. Are they used—Hot Springs, some call it Camas?

A. There is Camas Prairie and Camas Hot Springs.

Q. They are separate communities, or do they adjoin?      A. No.

Q. Are you acquainted with Mr. Larsen, who is now sheriff of Sanders County?      A. Yes.

Q. Camas is in Sanders County, is it not?

A. Yes.

Q. What did you tell them when they said they would give you \$100?

A. At the time I told them I would take it.

Q. You told them you would?      A. Yes.

Q. What did they say—was Mr. Reinhard doing the talking then?      A. Yes.

Q. Did the other gentleman who was with him who you cannot identify, did he do any talking?

A. I don't recall.

Q. You don't recall?      A. No.

Q. Was Mr. Old Horn a friend of theirs or a friend of yours?

A. He is my brother-in-law.

Q. Had you talked with him about this matter before this particular night you say they drove down?      A. No. [159]

(Testimony of Patrick Pierre.)

Q. Have you talked with him since?

A. Fred Old Horn?

Q. Yes, have you men talked it over?

A. No, we never talked about it.

Q. To whom did you make this statement or report that this Mr. Reinhard and Mr. Old Horn and a stranger, or someone you don't recognize, had attempted to give you \$100?

Mr. Pease: Objected to as assuming a fact not testified to by the witness, namely that Old Horn participated in the attempt to procure his testimony.

Mr. Taylor: I will qualify that.

Court: I think you might change that a little.

Q. Did you tell anyone, or who did you tell that John Reinhard had overtaken you about a mile on the other side of Plains and you had a conversation with him, and that he told you he would give you \$100? Did you tell that to anyone?

A. I spoke to the Indian policeman about it.

Q. You told the Indian police? A. Yes.

Q. At that time, or at any time before you talked with the Indian police, was there anything said by the authorities here in Missoula about having you arrested for taking somebody's automobile that night? A. No. [160]

Q. There wasn't anything said about that?

A. No.

Q. Was anything ever done about that?

A. No.



(Testimony of Patrick Pierre.)

Mr. Taylor: That is all.

Court: Any further question?

Mr. Angland: I think not, your Honor.

(Witness excused.)

FRED OLD HORN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. Will you state your name?

A. Fred Old Horn.

Q. That is two words, is it, Old Horn?

A. Yes, sir.

Q. Mr. Old Horn, where do you live?

A. In Camas Prairie, Montana.

Q. Are you acquainted with Patrick Pierre?

A. Yes.

Q. Did you know him in December, 1945?

A. Yes, I did.

Q. You will have to speak a little louder for the jury.

A. I do know him. [161]

Q. Did you know him in December of 1945?

A. Yes, I did.

Q. Do you know John Reinhard?

A. No, I am not acquainted with him.

Q. Have you ever seen John Reinhard before today, the man in the center here?

A. Well, yes, I did.

Q. Do you recall seeing him in December, 1945?

A. I don't remember the date.

(Testimony of Fred Old Horn.)

Q. You don't remember the date?

A. I see him about three or four times around here in Missoula.

Q. Down here?

A. Yes, walking around the street.

Q. Did you see him up near Plains, Montana, or Camas Prairie, Montana, in December, 1945?

A. I don't remember the date.

Q. Did you hear Patrick Pierre just testify?

A. Yes.

Q. Do you remember being in the car when Patrick Pierre was met on the road near Plains, Montana?

A. Just Pierre?

Q. Just Pierre.

A. I know we picked him up.

Q. We picked him up. You mean by that you were with someone else and picked up Pat Pierre?

A. Yes.

Q. Who were you with?

A. Johnny Reinhard, I guess it was.

Q. Who else? A. I don't know.

Q. You don't know the other man?

A. No.

Q. When did you get in the car with John Reinhard?

A. I was in the house and they came up looking for Pat there.

Q. At what house? A. Our house.

Q. At your home? A. Yes.

Q. And who else lived there? A. My wife.

Q. Where is that?

(Testimony of Fred Old Horn.)

A. In Dupree's Lumber Company near Dog Lake, Montana.

Q. John Reinhard with someone else came to your house?

A. No, they didn't come up to the house. I was just going to catch a ride down town and I thought I would catch a ride with them.

Q. How did you know they were looking for Pat Pierre?

A. I was pretty drunk. They asked if I knew where Pat lived and I told them I believed he went to Plains. [163]

Q. Who said that?           A. What?

Q. Who told you they were looking for Pat Pierre and that they wanted to find him?

A. They didn't say if they were looking for Pat. Johnny asked me where Pat was and I told him he went to Plains.

Q. Who asked you?

A. Johnny Reinhard. I don't know him, that is all I know is his name.

Q. Is that the man sitting in the middle of those three men (Indicating defendants)?

A. I don't know, I was pretty drunk that night.

Q. Did you get in the car with them?

A. Yes, I got in the car with them two there. I don't know which two, though.

Q. Is John Reinhard one of them?

A. He must have been.

Q. You know whether he was there or not, don't you, Fred?

(Testimony of Fred Old Horn.)

A. He was in the car. I wouldn't testify—I believe he was. I was pretty drunk. I was drunk when they got up there and I was drunk when we got here too.

Q. Did you show John Reinhard where Pat Pierre was?

Mr. Higgins: Just a moment. We object to that question as assuming a statement made by the witness not in the record. He doesn't know. [164]

Court: Well, ask him how he found Pierre, where and when they found him, if they saw him.

Q. Did you see Pat Pierre that evening?

A. I don't know, it was that evening or the next morning. We met him down here by the road this side of Plains someplace.

Q. This side of Plains?            A. Yes.

Q. On the highway. When was that?

A. When?

Q. Yes?

A. That is what I don't recall, whether it was night or morning.

Q. How long after you got into the car?

A. That is what I don't know, I was drunk.

Q. Do you remember what was said after Pat Pierre got into the car?

A. No, I passed out. I came to myself in Missoula. I don't know if they brought me up here or not, but I believe they did.

Mr. Angland: Cross-examine.

Mr. Taylor: No cross-examination.

(Witness excused.)

## GEORGE P. RHOADES,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Angland:

Q. State your name, please.

A. George Rhoades.

Q. Where do you reside, Mr. Rhoades?

A. Missoula, Montana.

Q. What is the nature of your employment?

A. Special Agent of the Federal Bureau of Investigation.

Q. As an agent of the FBI, have you had assigned to you for investigation the case now on trial?      A. I have.

Q. When was that first assigned to you for investigation?

A. It was first assigned to me—I don't have my assignment card.

Q. I don't mean as an official channel. When were you first requested to investigate this case?

A. Immediately after the trial was over.

Q. What trial?

A. When the Sam Catrino and John Reinhard trial was over in 1946.

Q. Was it the same day or later?

A. The same day.

Q. At whose request?

Court: I think so. Sustain the objection. [166]

Court: I think so. Sustain the objection.



(Testimony of George P. Rhoades.)

Q. Now, Mr. Rhoades, in the course of your investigation of this case, did you seek out Mr. James B. Rennaker, or did he come to you and volunteer the information?

A. I sought him.

Mr. Higgins: Just a minute. Object to that as incompetent, irrelevant and immaterial and having no probative value on the issues involved in this proceeding.

Court: I don't know whether there is or not. Neither of us can tell at this particular stage.

Mr. Angland: I will be glad to state our basis in the absence of the jury.

Court: I think perhaps we had better do it. Ladies and gentlemen, will you retire to the corridor and just remain without the hearing of what we are discussing here for a few minutes, but be ready to come back as soon as the officer notifies you.

(Jury retires from Courtroom.)

Mr. Angland: May it please the Court, on cross-examination, an attempt was made, I believe, through examination, to show animosity on the part of Mr. Rennaker, and the inference given that the trucks were taken from him and as a result, this man is being prosecuted, Mr. Catrino is being prosecuted. This evidence is offered to contradict that and to corroborate the answers given by Mr. Rennaker on cross-examination by counsel. [167]

Court: You mean a statement was made by

(Testimony of George P. Rhoades.)

Rennaker to Mr. Rhoades? You want Mr. Rhoades to testify to statements made to him by Rennaker, who is not on trial here?

Mr. Angland: No, your Honor. I want to show as a result of animosity, Rennaker did not come to the FBI and seek prosecution of Catrino, but rather that Mr. Rhoades sought out Rennaker in order to investigate this case.

Court: Couldn't you do that by showing what Mr. Rhoades did in the course of his investigation? During his testimony it would be disclosed, wouldn't it, he sought him out and went to see him in the course of his investigation?

Mr. Angland: That is what I meant to ask. That is as far as I want to go.

Court: You didn't put it that way.

Mr. Angland: We would make a motion as to Mr. LaValley. We have no proof as to him.

Court: Motion is granted and Mr. LaValley is dismissed as a defendant in the case.

(Whereupon, at 3:15 p. m., July 8, 1948, a 15 minute recess was taken.)

(Jury returned to the Courtroom.)

Court: The jury weren't in the room when the motion was made dismissing the case as to the defendant LaValley, so they are advised that the motion was granted to dismiss the case as to the third defendant, LaValley. You may proceed with the examination. [168]

Q. (By Mr. Angland) Mr. Rhoades, in the

(Testimony of George P. Rhoades.)

course of your official investigation of this case, did you contact James B. Rennaker?

A. I did.

Q. By virtue—in your official capacity, by virtue of his coming to your office and volunteering a statement, or did you have to go out and seek him out?

A. I went out to his place.

Mr. Angland: You may cross-examine.

**Cross Examination**

By Mr. Taylor:

Q. At the time you went out to his place, Mr. Rhoades, did you know there was friction existing between Mr. Sam Catrino, the defendant, and Mr. Rennaker?

A. No, I did not.

Q. You didn't know there was any friction as to money affairs as between the two?

A. No.

Q. When did you contact Mr. Rennaker?

A. March 11, 1947.

Q. March 11, 1947?

A. Right.

Mr. Taylor: That is all.

(Witness excused.) [169]

Mr. Angland: The government rests.

Court: Do you desire to make your statement.

Mr. Higgins: Your Honor, at this time, we would like to file a motion for acquittal, and if you will grant a few minutes, we would like to argue it in the absence of the jury.

Court: Very well.

(Jury retires from Courtroom.)

[Title of Court and Cause.]

## MOTION FOR JUDGMENT OF ACQUITTAL

Come now the Defendants and move the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the evidence is insufficient to maintain a conviction under Count Number One of the Indictment against Defendants, Sam Catrino and John A. Reinhard, or either.

2. That the evidence is insufficient to maintain a conviction under Count Number Two of the Indictment against the Defendants, Sam Catrino and John A. Reinhard, or either.

3. That the evidence is insufficient to maintain a conviction under Count Number Three of the Indictment against the Defendants, John A. Reinhard and Lester LaValley, or either.

J. D. TAYLOR,  
GEORGE F. HIGGINS,  
Attorneys for Defendants.

Served July 8, 1948, 3:15 p. m. Harlow Pease,  
AUSA. [170]

Court: Very well, you may proceed Mr. Higgins, or Mr. Taylor, whoever wants to speak on this motion.

Mr. Taylor: Well, the Court please, the motion, as the Court will see, is predicated on the fact that there is no competent evidence as against the defendants Catrino and Reinhard on the first count.

Now, the first count charges subornation of perjury, in that they procured one Rennaker to testify falsely in the case that was tried in this Court. Now, we take the position, the Court please, that we might eliminate the rule that requires two witnesses in most states to establish perjury, and we will assume, the Court please, to establish perjury, that it can be established by the testimony of one witness and corroboration. We go a step further and ask ourselves what is the rule and how much evidence is required to establish and prove the crime of subornation of perjury. Now, it is probably plain that, if the Court please, under our Constitution, that requires as much as the establishment by evidence of perjury and treason. All right. And I think a great many courts hold that it requires, in order to establish the crime as the government desires the crime to be established, the testimony of one competent witness and corroboration.

Now, the corroboration, the Court please, must be such as to connect this defendant with that particular crime. Now, what do we have here? If the Court please, we have the testimony of one witness, a Mr. Rennaker. I would hate to think, if the Court pleases, that my liberty, or the liberty of any citizen, could be taken from him on the uncorroborated testimony of Mr. Rennaker.

Now, what are the corroborating facts, if the Court please? I don't think that there is a corroboration, I don't think that the government has



proved that this man Rennaker committed the crime of perjury in the trial of the case on March 13, that is, they haven't established that fact as the law requires as protection for all of us against the crime of perjury, and so far as the crime of subornation of perjury, as against these two defendants, if the Court please, there is an entire absence of corroborating testimony.

The Court observed Mr. Rennaker as he testified. He didn't come out positively, honestly, honorably and above board. He equivocated here, there and in several instances. Now, if our life and our liberty is to be held so cheaply that we could be deprived of it on testimony of that nature, if the Court please, why we are all in jeopardy.

As to Mr. Reinhard, on Count 1 and Count 2, there is an entire absence of testimony that he participated in any way or manner in procuring Mr. Rennaker to testify falsely. The only testimony that the government has produced insofar as Mr. Reinhard is concerned, is on the morning that the case was tried, he came down there and to the Brunswick and that Mr. Rennaker was there, but not one scintilla of evidence, not an inference or innuendo that he did say anything. [172]

And on the third count, if it please the Court, as to offering Mr. Pierre on behalf of Mr. Reinhard \$100. Well, now, Mr. Pierre testified himself. He testified that they wanted him to come to Missoula and make a statement to the attorney. Following that conversation he said that he was offered, they

told him they would give him \$100, but he didn't take it. Now, we feel, if the Court please, that from the point of view of the government of the United States, that they shouldn't ask that any citizen be convicted of the crime of subornation of perjury unless the case is clear, convincing and that they establish that fact beyond a reasonable doubt.

Now, in this particular case, the state knows, the government knows the same as I do that the man Rennaker, upon whom their whole case is predicated, by his testimony, his action, the interest that he had in the proceedings, shouldn't carry great weight; that the testimony of the witness Pierre is likewise of the same character, and the corroboration on Pierre of Little Big Horn, or the gentleman they had here that said he was so drunk that night he doesn't know anything about it, and there is an entire lack of corroboration. The only attempted corroboration in the entire case submitted by the government was to corroborate Mr. Rennaker in his statement that he did swear falsely on March 13th. They attempt to corroborate that, that it was impossible, he wasn't there in that particular institution, didn't see the things done that he said were done, or the statements made that he testified were made. That is the extent of the corroboration of the original perjury upon which the subornation of perjury is predicated, and we feel, if the Court please, and I think we can say advisedly that the Courts lean very strongly to the proposition that we are attempting to get away from in

this case, that there must be some strong corroborating testimony to establish the fact; that we are secure in our person, secure in our liberty as against a perjury charge to the extent that there must be more than one witness to establish perjury and in subornation of perjury there must be competent testimony and that there must be corroboration, and there is an entire lack of corroboration, in our opinion, if the Court please, in this case.

Mr. Pease: Of course, if your Honor please, the counsel has completely ignored the record in this case. To begin with, the verdict of the jury in the Indian liquor case is not only corroboration of the government witnesses who testified here, Greenfield and Pierre, but it is an adjudication that the testimony of Reinhard was false given on the Indian liquor case. There is an absolute adjudication under the authorities that this is false without our ever putting Remaker on the witness stand to say it is false. He is corroborated by Greenfield, he is corroborated by Pierre. And in the circumstances of this case, if your Honor please, we have an all fours proposition with the McCoy case, just decided by the Circuit Court of Appeals. The attempt to influence, the offering of money, if your Honor please, is stronger than the McCoy case—there there was no offer of a bribe—but here there was an offer of money, not only solicitation, so that by the circumstances and by direct testimonial evidence there is ample corroboration in this record; and I would say if there is not sufficient evidence

in this case to sustain a verdict of guilty upon the charge contained in count 1 and the charge contained in count 2, which, of course, is the same facts from different legal reasoning, no case could ever be made.

I observe this, too, that counsel has not dwelt on the legal requirements of proof of count 2, which is not subject to the very drastic requirements of the law with reference to perjury and subornation of perjury. That is a plain statute that doesn't have any requirement connected with it, and the testimony of one credible witness is sufficient to sustain a conviction of count 2; and unless Mr. Angland has something further, we submit the motion should be denied.

Mr. Angland: I think of this, your Honor—there was another statement I don't find here. In a statement made by counsel with reference to the last count, I think he has misunderstood the record. He says the only request made of Pierre was that he come to Missoula and make a statement. My statement—my recollection is he was interrupted, but he did complete that statement, “and come to Missoula and make a statement to the lawyer in accordance with the story Reinhard gave”, not a statement of facts involved in the transaction of October 20, 1945, but rather the fabricated story Mr. Reinhard had concocted for him.

Court: Do you want to add anything?

Mr. Higgins: There can be no question that, as to count 1, subornation, assuming there is some



corroboration as to the falsity of the statements made by Rennaker, that is, if he testified falsely in the other case, if we assume there is some corroboration as to that, I would like to have counsel for the government point out to the Court one iota of evidence that corroborates the statement that Rennaker made that he was procured by Reinhard and Catrino to testify falsely. As to procurement, there is not one iota of evidence that he was procured by any other person than just his own statement, and courts have repeatedly held it isn't sufficient. Certainly, there can be no question but that count 1 should be withdrawn from the jury.

Count 2, it goes back to the original argument. If your Honor will look over the language of the charging part of the indictment, I don't care whether you call it obstruction of justice, whatever you call it, the charge is subornation of perjury.

Court: Oh, no, that is based on a definite statute. That [176] is the reason why I overruled your motion. There is a definite statute, a separate and distinct offense.

Mr. Higgins: It is our position it charges the same offense.

Court: That is my opinion in regard to it.

Mr. Higgins: Certainly as to count 1, there is no corroboration as to procurement. The only evidence is Rennaker's own testimony, and that isn't sufficient.

Court: Well, of course, so far as the perjury, there must be proof of the fact that perjury was



actually committed. Now, the judgment roll has been introduced here, and it is found that there was a charge there of selling liquor to an Indian ward of the Government of the United States, and the defendants plead not guilty. That brings to issue, of course, all the material allegations of the information. It was tried and against these two defendants. The jury found, of course, that the defendants were guilty. Now, included in that verdict would also be an adjudication that the defense was false and they didn't believe it, and that the testimony of Remaker as to how the transaction occurred, and that a Mexican purchased the wine in question and afterwards gave it to Pierre, was false. It seems to me that that is *res adjudicata*. It is a thing adjudicated and it stands and there can be no further question raised as to the fact of the commission, or as to the guilt of the defendants and the commission of perjury there by [177] reason of the verdict of the jury that they didn't believe the defense that was offered and that it was untrue. Otherwise, they would have been obliged to find for the defendants.

Now, then, the other question is subornation. Subornation of perjury and perjury itself are so closely connected that it is difficult to separate them and the requirements, as I understand the law, are the same for perjury and subornation of perjury. There must be corroboration. Now, either by one witness, corroboration by one witness or more than one witness, or if not by another witness, then by

circumstances that satisfy the minds of the jury that there is there present a substantial corroboration. Now, of course, this whole affair is so interwoven, so many circumstances connected with it, the testimony here would almost require a reconsideration and sort of an analysis to see wherein there is corroboration that the Court might consider substantial corroboration, that is, I mean, the corroboration of Rennaker that there was a procurement here, the circumstances that relate to his inability, for instance, to have been present and to have given any such testimony as was procured and presented in the original case.

Now, if the defendants, one or both of them—they were tried together. There was a defense. They must have procured and presented it. They presented this man Rennaker, who said that the sale of the wine was made to a Mexican and not to the Indian ward of the government. The verdict of the judgment was that that was not true. But I think the authorities will hold that it is adjudicated, *res adjudicata* of the facts that were presented there. Now, it seems to me that there is corroboration there in that very adjudication of the testimony of Rennaker. Then, too, the facts presented here show where he was, what he was doing, and the defendants must have known, of course, he wasn't there at all and couldn't have been there because the evidence here conclusively shows that he hauled a load of cattle to Butte that night. He didn't come back, or start back, until

sometime early in the morning of the 21st of October, 1945. All the circumstances and associations, transactions, business transactions, between Rennaker and the defendants, especially the defendant Catrino, shows a close connection, and if they didn't procure the testimony, who did? How did it happen? It was there and in their presence.

I think I would have to give further consideration to that motion before I could pass upon it. I think I will defer action on the motion. You may resume the motion later on for dismissal, but not for the present, I think I should overrule it for the present and require you to present your defense and then at the conclusion of the case, if we find a different situation, why I'll see what action will be taken at that time, so you may call in the jury.

Mr. Higgins: May we have an exception, your Honor?

Court: Yes, certainly. [179]

(Jury returns to the Courtroom.)

Court: You may proceed with your statement to the jury.

Mr. Taylor: This case now stands like this. The evidence in behalf of the defendants will be this: Now, the charge is made by Mr. Rennaker, who testified here, that Mr. Catrino procured him to testify falsely in the case that was tried in this Court on the 13th day of March, 1946. Now, the testimony in behalf of Mr. Catrino will be that this is not true, that he didn't do so, and as to Mr. Catrino's reputation for truth and veracity, we will show you

that he bears in this community a reputation for truth and veracity, and at the same time that this Rennaker bears a bad reputation for truth and veracity in the community here in Missoula where he resides. That evidence will disclose that Mr. Reinhard, on the morning of March 13, 1946, went to the Brunswick to bring the witnesses down, among whom was Mr. Rennaker, at Mr. Rennaker's request; that he requested he had no means of transportation and requested that they come and get him.

All right. We further expect to show that for some considerable time, as was related here by the witness Rennaker, Mr. Reinhard, or Mr. Sam Catrino had financed him in the purchase of a couple of trucks; that he carried him along, and that he was to repay him gradually from the hauling account with the Daly people; that before, even before this trial of March 13, 1946, that Mr. Catrino was dissatisfied with the [180] proportionate part of the earnings of this truck as operated by Mr. Rennaker in transporting stock for the Daly people, and they had altercations and that there was friction, and that after, sometime later, why Mr. Catrino took from Mr. Rennaker the trucks, and from that time on, Mr. Rennaker was seeking vengeance from Mr. Catrino, and that there was a motive in Mr. Rennaker's mind in doing what he did do in going and claiming now that he was induced to testify falsely at the investigation of Mr. Catrino. Now, if we establish those facts, of course,

we will naturally assume you will return a verdict in our favor. Thank you.

Now, if the Court please, in our testimony, I might say we are a little bit mixed up as to the time. We had our witnesses, some of them, subpoenaed for four o'clock today, and the officer to whom the subpoenas were given for service, the Marshal, is unable to contact two or three of our character witnesses.

Court: You can put those on later.

Mr. Taylor: It may be the testimony will not be in its natural sequence.

Court: Very well, I don't think there will be any objection to it, would there, of counsel?

Mr. Angland: No objection. [181]

### JOHN REINHARD

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Higgins:

Q. Will you state your name, please?

A. John Reinhard.

Q. Where do you reside, Mr. Reinhard?

A. 332 LeVasseur Street.

Q. How long have you lived here in Missoula?

A. I came here in 1918.

Q. And where have you been employed in Missoula?

A. I worked for J. B. Haviland for about 15 years, and during the last six months I have been



(Testimony of John Reinhard.)

working for my brother, Carl Reinhard, who runs a tin shop.

Q. Recently have you been working for Mr. Haviland?

A. No, not in the last six months.

Q. You were in the service during the last war?

A. Yes.

Q. Were you unable to be employed in his shop by reason of the fact he couldn't get materials when you came back? A. That's right.

Q. At that time you started working for Mr. Catrino? A. That's right.

Q. Are you acquainted with Mr. Rennaker?

A. Yes. [182]

Q. How long have you known him?

A. I would say three years or more.

Q. During the time you worked at the Brunswick Bar, was he a frequent visitor there?

A. Yes, he was.

Q. Both in the daytime and at night?

A. Yes.

Q. Were he and Sam engaged in some kind of trucking business together?

A. Yes, they were. It is the way I understood when I was working there.

Q. Do you know about when that commenced?

A. I would say about three years ago or more, that is when it commenced.

Q. Do you know when it was terminated, when it ended?

A. Well, when it was terminated, that was after

(Testimony of John Reinhard.)

March 13, 1946, about six months afterwards, after that date.

Q. Was it sometime after that?

A. Yes, it was sometime after that.

Q. Bearing in mind that the case that has been referred to was tried in March, 1946, do you know if Mr. Catrino and Mr. Rennaker had been having some real serious discussions and disputes over the trucks and how they were being operated and how the money was being disbursed therefrom?

Mr. Angland: Just a minute, have you fixed the time for that, Mr. Higgins?

Mr. Higgins: I beg your pardon, I believe it is fixed.

Court: Any objection?

Mr. Angland: I want to object to that your Honor, the difficulty they might have been having before March 13, 1946, would be irrelevant in this case.

Court: That was before March 13, 1946?

Mr. Angland: That is the question, I believe.

Mr. Higgins: It is for the purpose, your Honor, of showing that the feeling at that time was not particularly friendly and we feel it is proper in view of what has been said by the attorneys for the government.

Court: I think perhaps some reference to the time and place of the disagreement might be mentioned, the circumstances. You may answer the general question if there had been a disagreement before that time and then follow it up.

(Testimony of John Reinhard.)

Q. Had there been a disagreement before that time, Mr. Reinhard that you know of?

A. Before what?

Q. March 13, 1946?

A. No, I couldn't say, I couldn't swear.

Q. But you know that there had been difficulty long before Sam had taken the trucks away?

A. Yes, that is what I had heard. [184]

Mr. Pease: I move to strike the answer as hearsay.

Court: Yes, I think so.

Q. Did you ever have occasion, Mr. Reinhard, to be present when Sam and Rennaker would be arguing over the truck deal and how it was getting along?

A. Well, Sam used to tell me, you know—(interrupted)

Mr. Pease: Just a minute, we move that be stricken as hearsay, not responsive to the question which calls for a yes or no answer.

Court: Yes, I think so.

Q. I am just asking now with reference as to what you know yourself, John.

(Previous question repeated by reporter.)

A. Yes.

Q. You have heard Mr. Rennaker testify here this morning?      A. Yes.

Q. He said you came out to his house to pick him up the morning the case was tried on March 13, 1946.      A. I did.

Q. How did you happen to go out there?

(Testimony of John Reinhard.)

A. I seen Mr. Rennaker on the night before and Mr. Rennaker asked me to come out and to pick him up, and I was supposed to pick up some other lady that lived out on South 12th Street, Rhoda Wells. She was, you know, a witness in the case. So, I went over to Jim's house. It was between nine and ten—I just [185] don't remember the time, but it was between nine and ten—and Jim didn't have on his shirt or shoes yet, and he told me, he says—we got talking about Rhoda Wells—and he said, “You go over and pick her up,” and he said, “I'll take the truck and I'll meet you down at the Brunswick.” I says, “Okay, Jim,” and I went down there and picked up Rhoda Wells.

Q. Did he come down then in his own truck to the Brunswick?      A. Yes.

Q. You heard his testimony here this morning where he inferred you had encouraged him to testify falsely in the other case?

A. Yes, I heard that.

Q. John, I will ask you now to tell the Court and jury whether or not at any time you suggested to Rennaker that he in anyway testify falsely at the trial of the other case here in this Court?

A. Well, I'll tell you. I was supposed to have sold this Indian a quart of wine on Saturday night, and they didn't serve the warrant until on Monday afternoon until four o'clock, and so then I couldn't think back who was in the place, because you don't pay no attention to who is in the place all the time. People come and go. Like Jim Rennaker, one day

(Testimony of John Reinhard.)

he would go out on a hauling job and he would come in and have a few drinks, then when he would come in from the hauling job, he would stop again and probably stay until two o'clock, and, well, he just kind [186] of made a habit of that, so I couldn't swear if Jim Remmaker was in there that night or not.—(interrupted)

Mr. Pease: If the Court please, this is a long narrative, and I don't think it is responsive to the question, and we would have no opportunity to object to hearsay matter the way he is running on. I object to any further answer at this time.

Court: I don't know. It seems to me it is rather a round-about way to answer the question, but maybe he is coming to it in his own way, and if counsel thinks so, why we will let him go a little further.

Mr. Higgins: That is my thought, your Honor.

Court: Go ahead. Make it as brief as you can, get to the point and come to the answer as soon as you can.

A. Anyway, then, Jim, he came in on—I can't say if it was on Monday night or Tuesday night, it has been so long ago—and I guess he heard that we was picked up or charged—(interrupted)

Mr. Pease: If the Court please, we move to strike "I guess" and so forth as a conclusion and hearsay.

Court: Yes, it is far afield. I think you had better put questions to him and try to elicit the answers you want.



(Testimony of John Reinhard.)

Q. Did you at any time, John, ask Rennaker to come up into this court and testify to any facts that were false?

A. No, I never.

Q. Did Rennaker tell you and Sam also that he was there that night and that an Indian came up to him and asked him to buy [187] some liquor, and he said, "No," and that later on a Mexican went and bought it for the Indian and gave it to the Indian?

Mr. Pease: Objected to as leading.

Court: Yes, I think so. I will sustain it as a leading question.

Q. What, if any, statements were made to you by Rennaker which caused you to have Rennaker to be a witness in that case?

A. Well, I have to go around about it again.

Court: Just mention what statements he made that caused you to feel—that caused him to be a witness in the case.

A. I overheard him talking with Sam and I overheard Jim say to Sam that he was in there that night, and I wasn't right there, but I was standing not very far from them, I would say three or four feet from him, you know. I overheard them talking, and I overheard Rennaker say about some Indian being in there and about some Mexican, and so then about two or three days later, why me and Jim got to talking and he said he was going to be a witness for me and Sam.

Q. Did he at that time or any other time tell you what he was going to testify to?

(Testimony of John Reinhard.)

A. Well, not exactly, no.

Q. At any time did you suggest to him what he should testify to? A. No.

Q. That is true as to the morning of the trial or any other [188] time?

A. At the morning of the trial when he was down there, I don't think there was hardly anything mentioned about court or anything.

Q. That was merely a meeting place to come to the courtroom? A. That's right.

Q. Did you hear the Indian testify here on the stand, Pierre, with regard to all he had to say about you? A. Yes.

Q. Did you at any time go down to Plains and seek Pierre? A. I did.

Q. When was that?

A. It was about a week and a half or a week, rather, after they had served the warrant.

Q. Would that have been sometime the first part of December or the last part of November?

A. They served the warrant on the 21st of October, wasn't it?

Q. In any event, what is your best recollection as to what time of year you went down to Plains?

A. About the first of November, I imagine.

Q. Did you see Pierre on that occasion?

A. I did.

Q. Where was he? A. He was on the road.

Q. How did you find him? [189]

A. I drove up. I was up in the Brunswick bar and I seen Les LaValley and I asked him if he

(Testimony of John Reinhard.)

knew anybody by the name of Patrick Pierre, and he says, "I do," and I said, "Where does he live," and he said, "Up at Arlee, Montana," and I asked Lester if he wouldn't ride up with me, and he said he would. When we got up to Arlee, it was the wrong Pat Pierre. We found out from there that he lived up at Dog Lake so I asked Les if he wouldn't ride up and we drove up to Dog Lake and we met Old Horn.

Q. Is that the one who just testified on the stand?

A. That's right, and Old Horn knew Pat Pierre and he told me he was down at Plains and he offered to ride down with me and find Pat Pierre. On the way down through Plains, Old Horn said, "Here he is now in that car," so I stopped and got out, and Pat Pierre, he come over toward me in the car and we was standing around the car, and I asked him how that thing happened, because just like I said before, I was supposed to have sold this Indian wine on Saturday night and they didn't serve the warrant until Monday afternoon around four o'clock and I couldn't remember of no Indian being in the bar there, so that is why I drove up and asked him how that happened. He said, "Well, John, I am going to tell you how it happened. I was over next door drinking with some Mexicans," and he said, "The Mexicans and a red-headed woman wanted to come over to your place, so," he said, "we all went over there." And he said, [190] "We was in a booth," and he said, "The

(Testimony of John Reinhard.)

redheaded woman went up to the bar and she got beer and brought it in the booth." Then he said, "They wanted to get a quart of wine, so," he said, "I came up to you and I said, 'Vino Petillio' ", and, of course, that is about all that I know because we have done a lot of business.

Q. Is that Mexican?

A. Yes. So, I misunderstood him, he said, and I was just going to give him just a small glass of wine, and he said, "No, no, vino petillio, like this" (indicating), and he said then I knew what he meant and so then he said I reached down behind the bar and gave him a quart of wine and he gave me two dollars, and he says when he walked outside the bar, he says, "That is when I got picked up."

Q. What was his condition when you met him on the highway as to whether he was sober or drunk?

A. He wasn't sober and probably wasn't drunk, but he was drinking.

Q. Did he and Old Horn then come back to Missoula with you that night?

A. Yes, Old Horn and Pierre asked if they couldn't ride into Missoula with me so that I brought them into Missoula.

Q. Was there any statement made by you to Pierre, Old Horn or anyone else, about giving Pierre or anyone else \$100 to come in here and testify falsely in the Indian liquor case in [191] which you were charged?

(Testimony of John Reinhard.)

A. There wasn't.

Q. Did you offer him any money, John?

A. I did not.

Q. Did you say anything to him about coming in and testifying falsely in that case?

A. No, I did not.

Q. You heard him testify on the stand?

A. I did.

Q. Would you say he was telling the truth or lying?      A. He wasn't telling the truth.

Q. Mr. Reinhard, I will ask you again if you, at any time or in any manner, suggested to Mr. Rennaker or asked him or by any means whatever expressed to him that you wanted him to come in to this court and testify falsely in the Indian liquor case in which you were charged?

Mr. Pease: Objected to as repetition. It has been asked three times already and answered.

Court: Yes, I think so. He said he didn't do it.

*Cross-Examination*

By Mr. Angland:

Q. Mr. Reinhard, how did you go from Missoula to Plains?      A. In a car.

Q. Whose car?      A. Sam Catrino's. [192]

Q. Who accompanied you on the trip?

A. Lester LaValley.

Q. Now, the reason you went up there, as I understand what you have stated in response to Mr. Higgins' question, was that you couldn't remember what had occurred on the Saturday night in question?      A. That's right.



(Testimony of John Reinhard.)

Q. On October 20th, you didn't know whether you had sold any wine to an Indian, or whether you hadn't, is that right? A. That's right.

Q. That is what happened? A. Yes.

Q. Did you remember the group when you talked to Pierre, did you remember Pierre and the Mexicans and redheaded woman being in there?

A. No, I didn't.

Q. You didn't recall that?

A. No, I didn't recall that.

Q. Did you recall then that Pierre had been in there and said—what are those Mexican words you used? A. *Vino petillio*.

Q. Those are Mexican words, are they?

A. Yes.

Q. What do they mean, do you know?

A. Bottle of wine. [193]

Q. Did you remember the Indian boy coming to your bar when he refreshed your recollection on it?

A. Well, there we had a lot of Mexican trade at the time and a lot of Mexicans would come up to the bar and ask me the same question—not the same question, but the same words—and wanted a bottle of wine, so that I couldn't say I remembered Pat Pierre because—

Q. You weren't sure? A. I wasn't sure.

Q. Do you remember testifying in this court on March 13, 1946? A. I do.

Q. Did you tell the jury and Court at that time you weren't sure?

(Testimony of John Reinhard.)

A. I think I told the jury and court at that time that I didn't sell any wine to any Indian.

Q. I will ask you whether or not this is what you stated, I am reading from page 66 of the transcript: Question: "This Indian boy that claims you sold him this bottle of wine, tell the Court and jury whether it is a fact." Answer: "I didn't sell him no wine. I can tell him from a Mexican." "Some of the Indians are hard to tell?" That is the next question. Your answer: "Yes, but this guy isn't hard." Is that what you stated to that Court and jury at that time? A. Yes. [194]

Q. Now, when you stopped the car on the road and you saw Pierre and you asked him—I believe you stated you asked him how this thing happened. Is that what you said?

A. Yes—no, first I told him my name and I told him who I was and he knew me then and then I asked him how this thing happened.

Q. Just what did he tell you, now?

A. He said, "John, I fooled you." He said he was over there next door drinking with some Mexicans and a redheaded woman and he says that the Mexicans wanted to come over next door, "over there to your place," and he says, "I went over there with them." He said, "We went in the booth," and he said, "The redheaded woman went over to the bar and she got the beer," and then he says, "I wanted to get a quart of wine, so I went up to the bar and I said, 'Vino Petillio' ". He said, "You made a mistake and were going to give me

(Testimony of John Reinhard.)

a small glass of wine, and I says, 'no, no, petillio' ', and he showed me with his hands like that (indicating), and that I knew what he meant, and that I reached down behind the bar, got the wine and gave him the wine and he gave me \$2.00 and then he went out.

Q. Then, after you had talked with Pierre, did you make any suggestion to him there to come to Missoula and make a statement to your lawyer?

A. No.

Q. You never requested him at all? [195]

A. No.

Q. After he told you that and refreshed your recollection, you weren't sure as to whether he had done that or not, were you? A. No, I wasn't.

Q. Now, you stated also, you couldn't, after you were arrested on Monday, you couldn't think back as to just who was in the place Saturday night?

A. That's right.

Q. And you weren't just sure how many people were there or who was in there?

A. That's right.

Q. When were you arrested on Monday, what time of the day were you arrested on Monday?

A. Around four o'clock, a little after four o'clock.

Q. Less than 48 hours after the offense had taken place? A. Yes.

Q. Do you remember now who was there on Saturday night, October 20th?

(Testimony of John Reinhard.)

A. I don't, no, I don't remember who was there.

Q. Do you know how many people?

A. No, I couldn't say.

Q. Did you know on the day you were arrested how many people were in there?

A. Well, the only thing, that happened on Saturday night, [196] October 20th, that is—(interrupted)

Mr. Angland: Just a minute, the answer isn't responsive.

(Question repeated by reporter.)

Mr. Higgins: Let him answer. You asked the question.

A. Well, I couldn't tell you just the exact number, but I would imagine there would probably have been about ten or twelve.

Mr. Pease: Move to strike as not responsive. He was asked to state whether or not he knew on a certain day, not what he guesses or imagines.

Court: Yes—(interrupted)

A. I can't swear, so I will say no. I wouldn't swear to anything I don't know for sure.

Q. Did you state to the jury that tried the case on March 13, 1946, Question: "What would be your estimate as to how many there would be in there at 11 p.m." Answer: "There is a bar about 24 feet long and the bar was filled and there were some Mexicans sitting against the wall and in the booths." Is that what you stated?

A. At what time of the night?

Q. Well, it says about 11 p.m. That is the tes-

(Testimony of John Reinhard.)

timony, the transcript of what you stated to the Court and jury on March 13, 1946. You may read it if you like.      A. No, that's all right.

Q. How long have you worked for Mr. Catrino?

A. It wasn't very long, I would say about six months.

Q. Have you worked for him since?

A. Not after the trial, I didn't, not after March 13th.

Q. You never went back to work for him after the trial here?      A. No.

Q. Have you been quite friendly with him since?      A. Yes.

Q. You were rather closely associated?

A. I wouldn't say too closely, but we are just, you know, friends.

Q. What is the first time that you heard of any difficulty between Catrino and Reinhard or Catrino and Rennaker, I beg your pardon, due to their arrangement on the trucking business?

A. Well, I couldn't say, I couldn't even tell you the month because that has been so long ago that——

Q. You just don't know.

A. I just don't know.

Q. Now, you overheard Sam Catrino talking to Rennaker about what had happened on the evening of October 20th, 1945?      A. Yes.

Q. How long after the 20th of October, 1945, did you hear that conversation?

A. Well, they served the warrant on a Mon-



(Testimony of John Reinhard.)

day, and I couldn't say if it was on Monday evening or on a Tuesday evening.

Q. It was either that night or the following night? [198]      A. That's right.

Q. What did you hear said?

A. Well, this Jim said that—he was talking about some Mexican and about some Indian, but I didn't get the whole facts, I didn't—you know——

Q. You didn't pay much attention to what they were talking about?      A. No.

Q. It wasn't of any particular concern of yours when they discussed what had happened Saturday evening?

A. They was talking and I didn't want to be butting in. I was standing drinking at the bar with some other fellow.

Q. When was the first time you heard Mr. Rennaker tell the story he told the Court and jury here on March 13, 1946? When did you first hear that story?      A. When did I first hear it?

Q. Yes.      A. Who from?

Q. From Mr. Rennaker, or did you hear it first from Catrino. Which one told you the story first?

A. Jim Rennaker.

Q. When did he tell it to you?

A. About a week following after they had served the warrant.

Q. Sometime during the following week? About a week later?      A. Yes, probably. [199]

Q. Was Sam Catrino present when you heard the story?

(Testimony of John Reinhard.)

A. No, he wasn't. Me and Jim, we was drinking at a bar, at the Brunswick there, you know, just me and Jim Rennaker, and he said, "I am going to be a witness for you." I says, "Are you?" and he said "Yeah." He said, "You know I was in here that night," and he said, "Some Mexican come up to me"—no, he said, "Some Indian," he said, "That this Indian wanted me to buy him some wine." I said, "Did he?" He says, "Yes." He says, "Yes," but he said, "I didn't do it."

Q. Well, now, I think you have completed the answer and then some. That is about a week after you heard Jim Rennaker and Sam Catrino talking about the matter?

A. Maybe four or five days after.

Q. Sometime within a week after?

A. That's right.

Q. You had heard them talking about the matter?

A. That's right.

Q. When was the first time you and Sam Catrino and Rennaker together went over the story?

A. Me and Sam Catrino and Jim Rennaker—we never did go over the story together.

Q. You never heard Rennaker tell the story to both of you at one time?

A. No.

Q. It was told you more than once, wasn't it?

A. We kind of talked it over, me and Jim

Q. Was it polished a little as time went along, or did it stay exactly the same?

A. Just the same.

Q. There was no change in that story from the

(Testimony of John Reinhard.)

first time you heard it until it was told on the witness stand here in the courtroom on March 13, 1946?      A. No.

Q. Not an iota?

A. In the first place I couldn't tell you, I couldn't just remember exactly word for word what Jim Rennaker did say, because that has been so long ago that you know I couldn't just tell you word for word what was said, but I could just give you an idea.

Q. That trial was quite an event in your life, wasn't it, on March 13, 1946?

A. That's right.

Q. You remember Jim Rennaker testifying in this courtroom, don't you?      A. I do.

Q. Was the story he stated in court substantially the same story he had told you the first time you had talked to him about what had happened that Saturday night?

A. Well, it probably wasn't just word for word, no.

Q. He changed an "and" or a "the" here and there? [201]

A. But I can say it was.

Q. It was the same story?

A. It was the same story.

Q. Now, on the morning of the trial, you did see Jim Rennaker down in the Brunswick Bar?

A. I did.

Q. Was anybody having a drink at that time?

A. Yes, me and Jim Rennaker and Mrs. Mur-

(Testimony of John Reinhard.)

phy and Rhoda Wells, we all had a couple of drinks before we come up here.

Q. Mrs. Murphy also testified in the case, I don't believe Rhoda Wells did?

A. That's right.

Q. But you had a couple of drinks, and I believe you said on direct examination there was no discussion at all as to this case that morning, as to the case going to be tried at ten o'clock that morning, no discussion of that?

A. Not that I can remember of.

Q. Well, what did you talk about that morning?

A. Well, just like anybody else would talk at a bar.

Q. Well, anybody coming into court as a witness or a defendant at ten o'clock in the morning, what would they talk about. You say just like anybody else would talk. What did you talk about if you didn't talk about the trial or what the witnesses were going to testify to?

A. Kind of generally we was wondering what kind of a jury [202] we was going to draw, or who else we could get as a witness, or as a character witness and stuff like that.

Q. Witnesses were important, weren't they?

A. Character witnesses.

Q. Witnesses were important, any witnesses who knew any fact?

A. That's right.

Q. And it would be important to know what that witness would testify about, wouldn't it, and that

(Testimony of John Reinhard.)

is the thing you people were talking about, wasn't it?

A. We wasn't talking about what we was going to say.

Q. But you were talking about the case?

A. We were talking about the case.

Q. Then when you told Mr. Higgins on direct examination that your discussion did not concern the case, you didn't tell him the truth, did you?

A. Here is what I thought Mr. Higgins meant: If that we was talking about what each other was going to say upon the witness stand. That is what I thought he meant, but we wasn't talking about that.

Q. But you were talking about the case?

A. Yes, generally.

Q. Mr. Reinhard, when you took Sam Catrino's car up to Plains to find Pat Pierre, did you have his consent to take the car?      A. I did.

Q. And he knew what you were going up there for? [203]      A. He did not.

Q. Just loaned you the car?

A. That's right.

Q. Did he usually loan you the car?

A. Yes, yes, lots of times.

Q. I think you stated awhile ago that your testimony on the other trial was true testimony, didn't you?      A. Yes.

Q. Just as the rest of what you have told the Court and jury today?      A. That's right.



(Testimony of John Reinhard.)

Re-Direct Examination

By Mr. Higgins:

Q. In the fall of the year around about the 20th of October, and especially in 1946, wasn't it true that there were a number of Mexicans here in Missoula working in the beet fields?

A. That's right.

Q. And did those Mexicans, and especially on Saturday night, a great many of them gather at Sam's place?

A. Some nights the house would just be packed with them.

Q. Why was it that they gathered there in particular, do you know?

A. Yes, I can tell you the reason why. Sam can speak Italian and it is spoken close to Mexican, it is a Spanish language. Well, Sam, he can speak their language, and those Mexicans [204] who were working here at that time were all from Mexico and they didn't know much English, and that is why they came down to his place.

Q. You were convicted in that case and fined \$150.00?      A. That's right.

Q. Mr. Angland seems to have tried to make a great deal out of a difference in your testimony now as compared with what you did in the other case. I asked you, "They charge you with selling a young Indian boy some wine on the 20th of October, 1945?" Answer, "Yes, sir." "Is that true or false?" Was your answer, "I think it is false."?

Mr. Pease: I am objecting to this on the ground

(Testimony of John Reinhard.)

there is no foundation laid. It is not impeachment.

Mr. Higgins: I want to bring out the fact that Mr. Angland wasn't fair.

Mr. Angland: I think Mr. Angland was fair. He read from the record.

Q. (By Mr. Higgins): Was that your answer?

Mr. Pease: Same objection. This is not apparent impeachment. No foundation laid for it.

Court: Well, of course, if Mr. Angland brought out some testimony on the previous trial that might have been unfavorable to the witness, on re-direct by the counsel for the defendant, he could show some other testimony.

Mr. Pease: The whole record has been read.

Court: Some part of the record would put a more favorable interpretation on it.

Mr. Pease: That is in the record, your Honor. It is a matter of argument.

Court: I think on re-direct examination, Mr. Higgins had the right to call his attention to another part of the record if it explains or was a different statement.

Mr. Pease: Very well.

Q. John, likewise as to the number of people in there, your recollection as to the number that would be in there would be better in March, 1946, than it would be at this late date?

Mr. Angland: To which I object as calling for a conclusion of the witness.

Court: Yes, we can all guess at that sort of thing.

(Testimony of John Reinhard.)

Q. Was it your habit there at that bar to sell to Indians?      A. No, it wasn't.

Q. You had two big signs in the doorways of the entrance for Indians and minors to keep out?

Mr. Angland: To which we object, your Honor, as leading.

Court: I don't know. You may show that they were not selling to Indians, objected to it, and had a sign for Indians to keep out. It may have some bearing on the situation.

Q. When the Indian was referring to the Mexican term he had used, he said he had fooled you, is that right?      A. That's right. [206]

Mr. Higgins: That is all.

Mr. Angland: Nothing further.

(Witness excused.)

### SAM CATRINO

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Taylor:

Q. You may state your name to the Court and jury.      A. Sam Catrino.

Q. Where do you live, Mr. Catrino?

A. 412 Alder Street.

Q. That is in Missoula?      A. That's right.

Q. How long have you lived in Missoula?

A. I have been here since 1921.

Q. That would be about 27 years?

[(Testimony of Sam Catrino.)

A. Yes.

Q. Now, in what business have you been engaged since you came to Missoula?

A. I have been in the restaurant business all the time.

Q. When did you acquire the Brunswick, that is, the place you had in October, 1945?

A. I was there since 1941. [207]

Q. How? A. 1941.

Q. That comprises what, what does the Brunswick consist of? A. Just the bar now.

Q. How? A. Bar.

Q. Is that on what floor—is there more than one floor in the Brunswick, one-story?

A. No, two story.

Q. And the bar occupies the first floor?

A. That's right.

Q. And what is on the second floor?

A. A rooming house.

Q. Have you engaged in business in the Brunswick ever since you acquired it?

A. Yes, since 1941.

Q. In October, 1945, who, if anyone, was working for you in the bar? A. 1945?

Q. Who?

A. I don't know if John was working at that time or not. I think John worked at that time, 1945.

Q. Mr. Reinhard? A. Yes.

Q. You recall, of course, that shortly after the 20th of [208] October, 1945, you were arrested,

(Testimony of Sam Catrino.)

were you?           A. Well, that is, was on Monday.

Q. It was on Monday?           A. That's right.

Q. Do you know what day of the week the 20th of October was?           A. I don't know.

Q. Later on you were tried, were you?

A. Yes, sir.

Q. In this court?           A. Yes, sir.

Q. And that would be the following March of 1946?           A. Yes, sir, 1946.

Q. I think the date is March 13 of 1946?

A. Yes.

Q. You recall that?           A. That's right.

Q. You are acquainted with Mr. Rennaker?

A. Yes, sir.

Q. When did you first become acquainted with him, Mr. Catrino?           A. About 1944.

Q. 1944?           A. I believe.

Q. Were you associated with him in any business ventures?

A. No. In 1944 he come to me, he wants truck.

Q. A truck?

A. Yes, he wanted me to buy him a truck. He had been coming to me for pretty near one week, so finally I decided I would buy him one truck.

Q. What was he doing with the truck, or what was he going to do?           A. Haul stock.

Q. Haul stock?           A. Yes.

Q. What arrangements, if any, did you have with Mr. Rennaker about he paying you for the money you advanced to buy the truck?

A. Well, to begin with, to tell the truth about



(Testimony of Sam Catrino.)

it, he had no money. I bought his house, \$250.00 down, and then I helped him with truck, and I said, "Now, you can get by." He was hauling for Daly's all around. After about a month more he wants another truck, so I got another truck. Of course, you know, not very much coming in, but I pay out all the time though.

Q. What arrangement, Mr. Catrino, did you have with him whereby he was to pay you? How was he to pay you?

A. I said—I told him you can pay when he got a chance.

Q. When he got a chance? A. Yes.

Q. Was there any particular source that you were to get the [210] revenues from the work that he did?

A. No, it was on his own hook. If I was going to get interest on it, that was all I wanted.

Q. He was to pay you back? You weren't giving him the money? A. No.

Q. He was to pay you back?

A. That's right.

Q. Was he to pay you gradually or as he made it? A. As he made it.

Q. Do you know whether he was to haul livestock for the John R. Daly Company?

A. Yes.

Q. Was there any deal whereby you were to get any part of what he earned hauling for John R. Daly?

A. For two or three months it was pretty slow

(Testimony of Sam Catrino.)

payment. I said, "You better do something with the truck." I said, "I want you to do—If you give me Daly's work, if you pay me, it will be all right." Some months he pay half, some months he pay all. Sometimes he come back, "Sam," he says, "I am short \$20." I cashed check for what he paid then he kept going.

Q. Now, following the 20th day of October, 1945, and the Monday you say you were arrested——

A. Yes.

Q. And later on in March of the following year, 1946, you [211] were tried in this Court for selling liquor to an Indian?

A. Yes, sir.

Q. I think the sale was not made by you, was it, Mr. Catrino?

A. No, sir.

Q. You are not the bartender?

A. No, I was not bartender.

Q. Now, Mr. Rennaker testified in that case, did he not?

A. Yes.

Q. And he testified, and did you hear him testify?

A. Yes, I did.

Q. I will ask you to tell the Court and jury whether at that time you knew whether the testimony he gave in Court was true or false?

A. I think it was false.

Q. Did you know at that time he testified?

A. At that time, you mean, the first case?

Q. Yes. Now, at the time he testified in that first case, did you know whether the testimony he gave was true?

(Testimony of Sam Catrino.)

A. It was supposed to be. That is what he told me.

Q. You say he told you that? A. Yes.

Q. When did Mr. Rennaker first talk to you, Mr. Catrino, about testifying, when did he first talk to you about it?

A. That was on—let's see, I think it was around the 26th or 27th of the month. [212]

Q. Of October? A. October.

Q. That is shortly after you were arrested?

A. Yes.

Q. All right, you heard him testify that you procured him to do that, you procured him to give false testimony. What have you to say to the Court as to that, Mr. Catrino?

A. No, sir, I never approached him.

Q. I beg your pardon.

A. I didn't approach a witness to lie, I said, "You just tell what you know."

Q. Did he tell you, Mr. Catrino, the story, did he tell you what he knew when you talked with him? A. That's right.

Q. He told you that? A. Yes, sir.

Q. Did he tell you the same story he told on the witness stand in March, 1946, had he previously told you the same thing? A. That's right.

Q. Now, did you in any way, Mr. Catrino, attempt to get him to come into Court and tell, perjure himself for you, did you ever do anything to try to get him to do that? A. No, sir.

Q. You heard him testify that between the time

(Testimony of Sam Catrino.)

you first [213] talked with him—that is, you told him he had to do that, you had a mortgage on his trucks, or something to that effect? Did you hear him testify?      A. Yes.

Q. Did you hear him tell that in Court here?

A. That's right, I hear that.

Q. What will you say to the Court and jury as to whether or not you had that talk with him?

A. I never told him such a thing.

Q. You heard him say that, in response to questions by the attorneys, you had gone over and reviewed the testimony with him at different times up to the time of the trial?      A. No, sir.

Q. That you had talked it over and you would tell him what to say?      A. No, sir.

Q. I will ask you to tell the Court and jury how and when you first knew what Mr. Rennaker said he was going to testify to. When did you first know that, Sam?

A. It was on the 21st of—what month was it. December—no—after we got picked up, you know.

Q. That is after you were arrested, you call that “picked up,” Sam?      A. That's right.

Q. After you were arrested was it you had this conversation, [214] that you had this talk with Mr. Rennaker about it?

A. He told me, he says, “An Indian asked me for a bottle of wine.”

Q. I beg your pardon.

A. He asked me, “Sam, an Indian asked me for a quart of wine.” I asked him if he would go wit-

(Testimony of Sam Catrino.)

ness for me. He says, "Yes." That is all I know about it.

Q. Did he say anything to you about what he knew about it?

A. No, never said anything to me about what he knows about it, no sir.

Q. When did he first tell you what he knew about it, if he did tell you?

A. Four or five days after we was picked up we was talking about it. I says, "We got arrested the other day," and he found out we got under bonds, and I says, "Some Indian got a quart of wine," and I said, "Nobody knows which ones, nobody can testify after two or three days if the Indian got a bottle of wine," and I said, "You want to go and be witness for me?" He said, "Sure I go witness for you."

Q. An Indian got a quart of wine?

A. Yes, sir.

Q. Did you offer him any money?

A. No, sir.

Q. You heard him testify that recently after he come back from Great Falls that you offered him money to take the rap, told [215] him you would give him \$2,000 if he would take the rap?

A. No, sir, I never offered him one cent.

Q. You say, Mr. Catrino, that you financed or bought the trucks for him? A. Yes, sir.

Q. With the agreement that he would pay it back? A. Pay it back.

Q. Well, later on, did you and Mr. Rennaker



(Testimony of Sam Catrino.)

have any difficulty about he paying you. did you have any trouble about it, did he pay you, or didn't he pay you?

A. Most of the time he pay what he can, but sometime, you know, he was away behind, there was no payment made, you know, but he made payments once in awhile, he'll pay me, but sometimes he go months without paying things. They was taking my money just the same. I said, "We have got to do something, Jim, we just go in the hole all the time." I say, "I got to pay off repairing trucks. You keep most of the money." I say, "I never will get even with you."

Q. What, if anything, did you do Sam about the truck or trucks? Did you repossess or anything, take it from him?

A. No, he made remark—you mean about taking away?

Q. Did you take them away?           A. Yes.

Q. Did you take them both at the same time?

A. No, about a month apart, I guess. [216]

Q. What truck did you take first?

A. I took the GMC Semi.

Q. Then later?           A. I took the Chevrolet.

Q. What effect did that have on Jim's business?

A. The Chevrolet had a second mortgage on, and I had to pay the Chevrolet people who had the first mortgage before I can take it away. Of course, I just sold them out and wanted to clear it up and get through with this outfit.

(Testimony of Sam Catrino.)

Q. What was Jim's attitude toward you then, or how did he feel about it?

A. He got sore then.

Q. Was that after or before March 13, 1946?

A. After. It was around the first part of 1947.

Q. In 1947?           A. Yes.

Q. All right, at that time did he make any statements to you, what he was going to do or anything of that kind?

A. No, I never seen him for two or three months after that.

Q. Had he remained in Missoula?

A. I don't know whether he was working for somebody else or not. I never seen him for quite awhile.

Q. You never saw him for quite awhile?

A. Never saw him for quite awhile.

Q. Have you seen him within the past month or two? Have you [217] talked to him or him to you?           A. He come in one time.

Q. Come in where, Mr. Catrino?

A. He keep away sometime, just like be friendly, you know, just let it go. I say, "Hello, how you go, how you work, so long." That is all.

Q. Do you still have those trucks?

A. No, sir, I sold them all.

Q. You sold them all. Did you hear the testimony of Mrs. Rennaker that you kept on paying—giving him money to live on?

Mr. Angland: Mrs. Rennaker never testified to that.

(Testimony of Sam Catrino.)

Mr. Taylor: Didn't she?

Mr. Angland: We will object to that as not being a statement of record, your Honor. I don't think the record will show Mrs. Rennaker made **any such statement.**

Court: I think Rennaker on the stand himself admitted he received some money.

Mr. Taylor: Yes, Rennaker, I misunderstood.

Q. I will withdraw that and ask if you heard the testimony of Jim Rennaker that you were paying him money?      A. No, sir.

Q. Did you hear that?

A. Yes, I hear that.

Q. What have you to say to the Court and jury as to that?

A. I never give him one cent, give him nothings. [218]

Q. I will ask you, Sam, if on the morning of the 13th, at the Brunswick, that there were a number of people there, and among them was Mr. Rennaker, and a conversation took place in which he said he didn't want to testify and you said you would give him a couple of shots and that would brace him up.

A. I never gave him myself, I never. I wasn't even tending bar at that time. We had a bartender over there, but I was in and out. We all come together when court was going in the morning.

Q. Was any statement made in substance that you would give him two or three shots and brace him up?      A. Unless he was sick or something.

(Testimony of Sam Catrino.)

Q. Do you know what it means, the expression, "brace him up"?

A. I know what "brace him up" means.

Q. Kind of bolster him up. Did you ever make any statement to him of that sort? A. No.

Mr. Taylor: That is all.

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Court: Are your witnesses mostly character witnesses tomorrow?

Mr. Taylor: I think the rest of them are all character witnesses, if the Court please.

Court: We will finish tomorrow, will we?

Mr. Taylor: Yes.

Court: I think perhaps we had better suspend until the [219] morning.

(Whereupon, at 5:00 o'clock p.m., July 8, 1948, an adjournment was taken until 10:00 o'clock a.m. July 9, 1948, at which time the following proceedings were had, the jury being present, and the defendants being present in person and represented by their counsel):

### **SAM CATRINO**

resumed the witness stand for

### **Cross-Examination**

By Mr. Angland:

Q. Mr. Catrino? A. Yes.

Q. I believe you stated yesterday you are the proprietor of the Brunswick Bar? A. Yes.

Q. The licenses in the Brunswick Bar are in

(Testimony of Sam Catrino.)

your name?           A. Not now.

Q. Not now in your name?           A. No.

Q. Whose name?           A. My wife's name.

Q. When did you transfer them?

A. Last month.

Q. Do you own the buildings in which the Brunswick Bar is located?

A. We both own the buildings.

Q. What is that? [220]           A. Both together.

Q. You and your wife?           A. Yes.

Q. You rent out the second floor of the rooming house to someone else?           A. Yes.

Q. You run the bar downstairs?

A. A restaurant beside that.

Q. You rent that, too?           A. Yes, sir.

Q. Who do you rent the second floor to?

Mr. Higgins: Just a minute, to which we object as incompetent and immaterial.

Court: I don't know. There has been a good deal said about the Brunswick Bar and the location and so forth. I think I will permit him to inquire who owns the place, who is in control of it, who is responsible for it, especially at the time of this occurrence. It isn't material what is going on there now.

Q. On October 20, 1945, did you rent the upstairs on the second floor?

A. Clarence Schmidt owned the building at that time.

Q. Did you own the building on March 13, 1946?

A. No, sir.



(Testimony of Sam Catrino.)

Q. Do you know who the tenant of the second floor of the [221] building was at that time?

Mr. Higgins: To which we object, your Honor. There is no probative value.

Court: I think he has already stated somebody by the name of Schmidt, wasn't it?

Mr. Angland: I think that was the owner of the building.

Court: I will let him answer.

A. Mabel Coleman, I think.

Q. She rents the second floor? A. Yes.

Q. Do you know what business is carried on there? A. Rooms.

Q. A rooming house? A. That's right.

Q. Now, Mr. Catrino, you stated that you bought the truck for Mr. Rennaker in?

A. 1944, I imagine.

Q. 1944?

A. I think it was 1944, yes, the first one.

Q. You said something about he mortgaged his house to make a down payment on it, was that it?

A. No, what I meant, Jim was broke. I told him I help him out. He told me, "If you buy trucks, I will pay them in two months." After I make up my mind, I bought him a truck. He was renting house out there. He showed me the house and he says, [222] "Can you buy it for me?" I says, "What they want?" "Two hundred fifty dollars down and twenty-five a month down payment."

Court: You don't need to let him tell a long

(Testimony of Sam Catrino.)

story like this. You can bring it out by questions and answers.

Q. I think, Mr. Catrino, you stated he worked on you for about a week before you bought the truck, is that right?

A. After me for buy truck.

Q. For a week? A. Yes.

Q. He didn't have the money to buy the truck?

A. Yes.

Q. You bought the truck after he talked to you for a week? A. Yes.

Q. Your arrangement with him was he could pay you when he could?

A. I had to give him a chance to begin.

Q. As you said, all you were interested in was interest on your money? A. That's right.

Q. Now, when did Mr. Rennaker first tell you the story? A. What story?

Q. That he told to the jury here on March 13, 1946. A. He never told me no story.

Q. He never told you no story? [223]

A. No, sir.

Q. He told you the truth, did he?

A. That is what I figured, he would tell the truth. He was supposed to say the truth as far as I know.

Q. As far as you know? A. That's right.

Q. When did he first tell you that?

A. Before the trial.

Q. How long before the trial?

A. That day he told me, he says to me, he said

(Testimony of Sam Catrino.)

an Indian asked him for a quart of wine. I says, "You know all about it then." Then I says, "Tell the truth, that is all I want you to tell."

Q. He came to you and volunteered this information?

A. No, I says, "We got picked up the other day."

Q. Just a minute. This was right after you were arrested?      A. Right after we was arrested.

Q. You went to him and told him you had been arrested?

A. I never went to him, he came down to the place.

Q. Down to the place?

A. Down to the place. I told him we got picked up for selling a quart of wine.

Q. When he came down to the place—I want to get the story straight if I can—when he came there, you went over and told him you got picked up for selling wine? [224]

A. He found out himself at the same time.

Q. He knew it when he came to your place?

A. Then he told me an Indian asked him for wine, and I asked him, "If you want to go wit-ness," and he said, "You bet you."

Q. Did he describe the Indian to you?

A. No, sir.

Q. Didn't tell you what the Indian looked like?

A. No, sir.

Q. The Indian's name?      A. No, sir.

Q. Didn't tell you who it was?      A. No, sir.

(Testimony of Sam Catrino.)

Q. But he just said he knew him and he came up to Rennaker and tried to buy a quart of wine, is that right?      A. That's right.

Q. Did you tell him who the Indian was you were supposed to have sold the liquor to?

A. No, sir, I didn't know myself.

Q. As long as he told you that story, you wanted him as a witness in Court. You had him for a witness?

A. I don't know at that time who was around, but if you want to go for witness that is all we want you for.

Q. That's all you wanted him for, is that right?

A. That's right. [225]

Q. You didn't ask him for a description of the Indian?      A. No, sir.

Q. And he didn't give you the description of the Indian?      A. No, sir.

Q. Did he tell you he was an Indian?

A. He said he was an Indian.

Q. How did you know he was the same Indian?

A. I never said it was the same Indian.

Q. You didn't know it would be the same Indian?      A. No, sir.

Q. But you thought anybody who had seen an Indian in there buying wine would be a good witness in your case, is that right?

A. That is what he told me.

Q. You are the one that told him he would be a good witness.

A. No, sir, he said he would be a good witness.

(Testimony of Sam Catrino.)

Q. Did you think he would be a good witness?

A. He was a witness, wasn't he?

Q. Did you think he would be a good witness before he came into court?

A. I don't know whether he was going to be a good witness or not.

Q. You knew you were only charged with selling wine to one Indian, didn't you?

A. Yes. [226]

Q. What made you think he was talking about the same Indian?

A. I didn't say he was talking about the same Indian. It was the same Indian as far as I know.

Q. You didn't know whether it was the same Indian or not?      A. No, sir.

Q. Lots of them come in from the Flathead Reservation?      A. Sure.

Q. Lots of them come in, drop in your place once in awhile?      A. All over town.

Q. Lots of them down in the vicinity where your place is?      A. We got a sign in the door.

Q. Lots of them are outside?

A. I can speak Mexican myself. Mexicans—  
(interrupted)

Q. Indians don't speak Mexican for you, do they?      A. Some Indians do.

Q. You are Italian?      A. Italian.

Q. You don't have any trouble telling the difference between an Indian and a Mexican, do you?

A. I can tell sometime.



(Testimony of Sam Catrino.)

Q. Did you know when you came into Court on the morning of March 13, 1946, that Jim Rennaker was going to testify for you?

A. He was going to tell the truth, what he knew.

Q. He was going to be a witness in your defense, you knew that, didn't you? [227]

A. He wanted to be a witness for me, supposed to be a witness, anyhow.

Q. Did you know he was going to come in here and take an oath before the Clerk and testify in your defense?

A. That's right.

Q. You knew that before you came into Court that morning, didn't you?

A. Of course we knew it.

Q. Of course, you did, but you didn't know whether Pierre and the Indian Rennaker was talking about were the Same Indian, did you?

A. No, I don't.

Q. Now, Rennaker told you a story about an Indian right after you were arrested. Now, how many times did he tell you that story between the first time you heard it and the day you came to trial here on March 13, 1946?

A. He never tell me no story.

Q. I am not indicating to you it was a false story. He told you what you thought was the truth. How many times did he tell it to you?

A. He told me he was going to be witness.

Q. How many times did he tell it to you?

A. A couple of times.

(Testimony of Sam Catrino.)

Q. About twice between October 22 until March 13, 1946? A. Something like that. [228]

Q. About twice. Didn't he tell it to you on the morning of March 13, 1946, before you came up here to testify? A. Never told me anything.

Q. Never told you anything? A. No, sir.

Q. Down at the Brunswick Bar that morning?

A. I was **by there**.

Q. You weren't tending bar? A. No.

Q. You had a bartender hired?

A. That's right.

Q. As you heard John Reinhard say, everyone had a few drinks?

A. All drinking, I suppose.

Q. Whose liquor did they drink?

A. The Brunswick Bar's.

Q. You weren't charging your witnesses for the drinks, were you? A. No, sir.

Q. You didn't let the bartender charge those people for that liquor, did you?

A. Everyone pay for his own.

Q. Everyone paid for his own?

A. That's right.

Q. Just before you came up to Court with all your witnesses you had the bartender collect for each drink? [229]

A. One buy one, the other buy another one.

Q. The bartender rang up a charge for each drink? A. Yes, sir.

Q. Did you talk to Jim Rennaker that morning?

(Testimony of Sam Catrino.)

A. We was up there and Johnny come down and we all come together, that is all.

Q. Did you talk to Jim Rennaker at the Brunswick Bar that morning?

A. We did talk together.

Q. What did you talk about?

A. We talk about we were going to get up there to the Court.

Q. Get up to Court? A. That's right.

Q. So you could come up here and try the case. Did Jim Rennaker tell you what he was going to testify to when he came up in Court?

A. No, sir.

Q. He didn't tell you what he would say when he got here? A. No.

Q. Did you ask him? A. No, sir.

Q. Did you tell him what to say?

A. No, sir.

Q. What did you talk to Mr. Rennaker about that morning, Sam? [230]

A. I just say it is time we go up there to Court.

Q. That is all you said?

A. I was a little late myself when I get in there. I had the car, and we all come in the car.

Q. How many drinks did they have there that morning? A. I don't know.

Q. How many do you think they had?

A. I wasn't right there when they was drinking, I was kind of late.

Court: Ladies and gentlemen of the jury, can

(Testimony of Sam Catrino.)

you hear the witness and understand what he is saying? Very well.

Q. Now, Mr. Catrino, you said yesterday that you never gave Jim Rennaker a cent?

A. Yes.

Q. Since this case was filed against you?

A. Yes.

Q. Well, did you ever loan him any money?

A. Not since we had that trouble, not since I took the truck away.

Q. Not since you took the truck away?

A. No.

Q. That would be back in February, the last part, of 1947, the first truck was taken away, the next one the first part of May, 1947, is that about right?

A. Yes. [231]

Q. You never did give him anything since that time?

A. Yes.

Q. Is that right?

A. Yes.

Q. Did you ever loan him any money since that time?

A. No.

Q. Did you ever give Mrs. Rennaker any money?

A. No, sir.

Q. Never any money to Mrs. Catrino since that time?

A. No, sir.

Mr. Angland: At this time, your Honor, I wish this witness excused for further cross-examination, but I would like to have leave to recall the witness for further cross-examination later today, possibly this morning after we have a morning recess.

(Testimony of Sam Catrino.)

Court: Very well, you may proceed with re-direct.

Mr. Taylor: I don't think there is any re-direct.

Court: Very well, the witness is excused from the stand.

(Witness excused.)

LESTER LaVALLEY,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Higgins: [232]

Q. State your name, please?

A. Lester LaValley.

Q. Where do you reside, Lester?

A. Missoula.

Q. How long have you lived here?

A. Since 1940, eight years.

Q. How old are you now?

A. Twenty-two.

Q. Where are you employed at the present time?

A. Jack Dougherty.

Q. Do you recall toward the latter part of 1945 of making a trip down to Plains or in that vicinity with John Reinhard?

A. Yes.

Q. Do you recall about when that was?

A. No, it was in November, I think.

Q. In November that year?

A. Yes, I think.



(Testimony of Lester LaValley.)

Q. What time of day did you leave Missoula?

A. In the afternoon about four o'clock.

Q. Who were with you?

A. Jack Reinhard.

Q. Just the two of you?           A. Yes.

Q. Where did you go?

A. We went to Plains, Montana. [233]

Q. And in the vicinity of Plains, did you meet a party by the name—an Indian by the name of Old Horn, who testified here yesterday?

A. Yes.

Q. Did you hear his testimony?           A. Yes.

Q. Tell the Court and jury where you met Mr. Old Horn?           A. Met him at Dog Lake.

Q. Is that near Hot Springs?

A. Yes, I believe it is.

Q. Did you inquire from him, or did Reinhard inquire from him as to where Pat Pierre was?

A. Reinhard.

Q. Did Old Horn tell him?           A. Yes.

Q. Did he say where he was?

A. No, he said he was in Plains. He never told him exactly where he was.

Q. What did you do then?

A. Went to Plains.

Q. In your car or Old Horn's?

A. Johnny's car.

Q. Old Horn went with you?           A. Yes.

Q. You started back toward Plains? [234]

A. Yes.

(Testimony of Lester LaValley.)

Q. Did you meet Pierre along the road?

A. Yes.

Q. Did he get in your car, or did you folks get in the car he was in?

A. He got in the car we was in.

Q. What would you say as to whether or not he had been drinking at the time?

A. I believe he was drinking.

Q. Still able to get around? A. Yes.

Q. Were you present there when John Reinhard had any conversation with Pierre? A. Yes.

Q. Did you, at that time, that day, Lester, at that place, or any other place, hear John Reinhard make any offer to Pierre concerning testimony that he would give in the liquor case that was coming up? A. No.

Q. Did Reinhard at any time that day say anything to Pierre about one hundred dollars?

A. No.

Q. Did he say anything to Pierre about coming into court here and testifying to some facts that weren't true facts? A. No. [235]

Q. Did you ride back to Missoula with him?

A. Yes.

Q. Did Old Horn come along too?

A. Yes.

Q. Was he intoxicated? A. Yes.

Q. How about Pierre, would you say that he was intoxicated?

(Testimony of Lester LaValley.)

A. No, I wouldn't say he was intoxicated, but he had been drinking.

Q. During all of the time that Reinhard was in the presence of Pierre, were you also there?

A. Yes.

Q. Was there at any time on that day or the next day or the day before, or any time you were there anything said by Reinhard to Pierre about coming into Court and testifying falsely to any facts?

A. No.

Mr. Higgins: You may cross-examine.

**Cross Examination**

By Mr. Angland:

Q. Mr. LaValley, were you invited by Reinhard to go to Plains, Montana, that day?

A. Yes.

Q. Did anybody else ask you to go?

A. No. [236]

Q. Where did you meet Mr. Reinhard that day?

A. The Brunswick Bar.

Q. Here in Missoula?

A. Yes.

Q. Did he tell you what the purpose of his trip was?

A. No.

Q. Mr. Reinhard didn't tell you what the purpose of the trip was at all?

A. No.

Q. Just asked you to get in the car?

A. Yes.

Q. You didn't know where you were going or why?

A. I knew where we were going. We were going to Arlee.

(Testimony of Lester LaValley.)

Q. Arlee? A. Yes.

Q. What were you going to Arlee for?

A. We was going—I thought I knew Pierre, but when we got talking to him, we found out it was the wrong one.

Q. He did tell you what he was going to Arlee for? A. Yes.

Q. I thought you said a minute ago he didn't tell you why you were taking the trip.

A. He didn't right at first when he first asked me to go riding with him.

Q. Maybe I didn't make myself clear. He didn't tell you when you sat down in the front seat of the car? A. No. [237]

Q. When you sat down, he did tell you?

A. We was just riding around town and he asked me about Pierre and I told him I knew Pierre at Arlee.

Q. You were talking about the case that had been filed against Catrino and Reinhard?

A. Yes.

Q. And the fact that Pierre was the Indian involved in that alleged violation of law?

A. Yes.

Q. So you were going to help him out in locating Pat Pierre? A. Yes.

Q. Did he tell you why he wanted to see Pat Pierre? A. No, he didn't.

Q. You knew, didn't you, that Pat Pierre was the fellow that would have to testify for the gov-

(Testimony of Lester LaValley.)

ernment in a charge of that kind, didn't you?

A. Yes.

Q. You knew Pat Pierre would be a government witness, didn't you? A. Yes.

Q. You went along to assist Mr. Reinhard?

A. Yes.

Q. What assistance were you going to give?

A. I don't know what you mean.

Q. How were you going to help him out? You went along to help?

A. I was just going to help him locate him.

Q. Why did he want to locate Pierre?

Mr. Higgins: Objected to as not a proper question to put to this witness.

Court: I don't know. Overrule the objection.

Q. Did he tell you why he wanted to see Pierre?

A. No.

Q. Didn't he tell you what he wanted to talk to Pierre about? A. No.

Q. You just knew it was about this case, and that is all? A. Yes.

Q. Did he ask you to go with him so that you would be able to tell what Pierre said?

A. No.

Q. Well, you started from Missoula for Arlee, Montana? A. Yes.

Q. To find the Pierre you knew? A. Yes.

Q. You went through Plains on the way, didn't you? A. To Arlee, no.

Q. How far is Plains?



(Testimony of Lester LaValley.)

A. It is about 70 miles. [239]

Q. Arlee is only about 40 miles, isn't it?

A. Yes.

Q. So, when you got to Arlee, you changed your plans and decided to go on up to Plains?

A. Yes.

Q. When you finally found Pierre, did you get out of the car with John Reinhard?

A. No.

Q. He said that he got out of the car and went over and talked to Pierre. When he talked to him, did you get out of the car and go with him?

A. No.

Q. You didn't then—when you said John Reinhard never made an offer of \$100 to Pierre, as a matter of fact, you don't know what he might have said when you weren't there, do you?

A. They were right behind the car and I could hear them talking.

Q. What did they say?

A. John Reinhard introduced himself to Pierre and told him he would like to talk to him and they got in the car.

Q. That is all he said?           A. Yes.

Q. Did he tell Pierre where he worked and why he wanted to talk?

A. Yes, he told him where he worked and he wanted to find out how that happened. [240]

Q. What happened?

(Testimony of Lester LaValley.)

A. How "I happened to sell the quart of wine to you."

Q. He asked Pierre, "How did it happen I sold you a quart of wine? A. Yes.

Q. You heard Reinhard say that to Pierre?

A. Yes.

Q. Did you hear him say anything else to Pierre?

A. Not that I can remember now.

Q. Did they get in the car immediately then?

A. Yes.

Q. And did they talk about how it happened?

A. Yes.

Q. Who did the talking?

A. Johnny asked him how it happened and he said he just went up to him and talked Mexican that he wanted a quart of wine. I don't remember how he said it, but he did say it that night. Johnny gave him the quart of wine and he walked out and got picked up.

Q. That is what Pierre said to Reinhard?

A. Yes.

Q. What did Reinhard say to Pierre?

A. Reinhard just asked what happened and that is what Pierre told him. He asked how it happened he sold him a quart of wine. [241]

Q. That is all Reinhard said and Pierre asked him—Pierre told him the story and quit talking. Didn't they have any more conversation?

A. Not about that.

(Testimony of Lester LaValley.)

Q. What did they talk about after that?

A. Pierre talked about wanting a ride to Missoula, so they come to Missoula.

Q. You weren't in the Brunswick Bar on the evening of October 20, 1945, were you?

A. No.

Q. So when you stated that you never heard John Reinhard tell Pierre—you never heard John Reinhard say anything to Pierre about telling a false story in Court, you didn't know whether the story would be false or true? A. No.

Q. You didn't know whether John Reinhard and Pierre were talking about a true story or a false story, did you? A. No.

Q. Because you weren't there on October 20th?

A. No.

Q. How many times did John Reinhard ask Pierre to repeat that story?

A. Just once, I think, I believe.

Q. How many hours were you together? [242]

A. About two or three hours, I would say.

Q. What time did you first meet Pierre?

A. I believe it was about ten o'clock, nine or ten o'clock.

Q. Nine or ten o'clock? A. Yes.

Q. When did you arrive back in Missoula?

A. About twelve-thirty or one.

Q. How long did Pierre and Old Horn stay with you after you got to Missoula?

(Testimony of Lester LaValley.)

A. Just as quick as we got to Missoula, I went home.

Q. You left immediately? A. Yes.

Q. Did you say anything to Pierre about the story at all, about what occurred that night?

A. No.

Q. Did you say anything to Old Horn about it?

A. No.

Q. You never heard any money mentioned?

A. No.

Q. Have you ever talked to either Pat Pierre or Fred Old Horn since this case appeared?

A. No.

Q. Since that visit? A. No.

Q. That was the visit, you said, in November, 1945? A. Yes. [243]

Q. About that time? A. Yes.

Q. It could have been the first of December, somewhere along in there? A. Yes.

Q. Did you ever work for Mr. Catrino?

A. No, I never did.

Q. You hang around there, Catrino, around the Brunswick Bar? A. Yes.

Q. You make that somewhat of a headquarters when you are in Missoula? A. Yes.

Mr. Angland: That is all.

Re-Direct Examination

By Mr. Higgins:

Q. Mr. LaValley, when John and Mr. Pierre were talking, did Pierre say to John that, "I fooled you"? A. Yes, I believe he did.

(Testimony of Lester LaValley.)

Q. And did he use the expression that, "I told you I wanted vino Petillio"? A. Yes.

Mr. Pease: Just a minute, objected to as obviously leading, your Honor, he is just testifying himself instead of asking the witness. [244]

Court. It is leading, all right, as counsel knows.

Mr. Higgins: Yes, your Honor.

Q. What, if anything, was said by Pierre to Reinhard about getting the wine?

A. Well, he just said it in Mexican, and I knew then, but I can't remember now what he said. He told him in Mexican that he wanted a quart of wine.

Q. Did he say anything else as to how he procured it?

A. He made a motion. He says Johnny thought he wanted a glass and he says no, he wanted a bottle.

Q. Did Pierre and Long Horn ask to come into Missoula with you, ride in? A. Yes.

Mr. Higgins: That is all.

Mr. Angland: Nothing further.

(Witness excused.)



PAUL WILCOX,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. You may state your name to the Court and jury.      A. Paul D. Wilcox.

Q. Where do you live? [245]      A. Missoula.

Q. How long have you lived in Missoula, in the vicinity of Missoula?      A. Since 1919.

Q. What is your occupation?

A. I am the present day constable in the court of Judge Ralph L. Starr.

Q. Have you had any other official positions in Missoula?      A. Yes, sir.

Q. What position?

A. Deputy Sheriff for four years under Charles E. Sharp, and Chief of Police of Missoula for two years.

Q. I will ask you, Mr. Wilcox, if you are acquainted with Mr. James Rennaker?

A. I am.

Q. How long have you known him?

A. I couldn't just exactly say the exact date.

Q. Just approximately.

A. It has been the last three or four years, I think, the first acquaintance I had with the man.

Mr. Angland: Just a minute, you answered. We will object to any volunteer testimony, your Honor.

Court: All right, proceed. Propound questions.

Q. I will ask you, Mr. Wilcox, if you know his

(Testimony of Paul Wilcox.)

reputation for truth and veracity in this vicinity?

Mr. Angland: To which we object, your Honor, the reputation of Mr. Rennaker for truth and veracity is not in issue in this case.

Court: Is it in issue?

Mr. Angland: The matter has been litigated, I think, your Honor.

Court: It is litigated and adjudicated, what more do you want?

Mr. Taylor: I think in perjury and subornation of perjury that the Court——(interrupted)

Court: There aren't any distinctions much between subornation and perjury.

Mr. Taylor: I know there is a distinction.

Court: It is a very slight one.

Mr. Taylor: Very slight, but we have holdings of Courts where it was directly authorized that matter might be stated as to the matter of the reputation of the witness.

Court: Although it has been adjudicated, you want to add to the adjudication, is that it?

Mr. Taylor: No, all I want to do is present to the Court testimony disclosing the reliability that could be placed upon the person who has testified and is the arch witness upon which they predicate this charge.

Mr. Angland: They have the records of this Court.

Mr. Taylor: I understand that, but the Courts have repeatedly held——(interrupted) [247]

(Testimony of Paul Wilcox.)

Court: If you want to add to the adjudication I have mentioned, you will do it very briefly. I'll not let you call four or five witnesses on it.

Mr. Taylor: I would be rather brief if we may offer proof.

Court: Go ahead.

Q. Do you know his reputation in this community in which you live for truth and veracity?

A. I do.

Q. Is it good or bad?           A. Bad.

Mr. Taylor: That is all. You may examine.

Mr. Pease: No cross-examination.

(Witness excused.)

GARY McCLUNG,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Higgins:

Q. State your name, please.

A. Gary McClung.

Q. Where do you reside?           A. Missoula.

Q. How long have you lived here?

A. Off and on since 1933.

Q. Are you acquainted with James Rennaker?

A. Yes.

Q. How long have you known him?

A. Since 1944.

Q. What is his reputation in this community for truth and veracity?           A. Bad.

Mr. Higgins: You may examine.

(Testimony of Gary McClung.)

Cross-Examination

By Mr. Pease:

Q. What is your occupation?

A. Livestock trucking.

Mr. Pease: That is all.

Re-Direct Examination

By Mr. Higgins:

Q. Mr. Rennaker formerly worked for you, didn't he?

Mr. Pease: Just a moment. I object to that as improper redirect examination.

Court: Yes, sustain the objection.

Mr. Higgins: That is all.

(Witness excused.) [249]

J. W. HAY

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. You may state your name to the Court and jury.

A. J. W. Hay.

Q. Where do you live, Mr. Hay?

A. Missoula.

Q. How long have you lived in Missoula?

A. Thirteen or fourteen years.

Q. What is your occupation?

A. Truck driver.

Q. I will ask you if you are acquainted with James Rennaker?

A. I am.

(Testimony of J. W. Hay.)

Q. Do you know his reputation for truth and veracity?

Mr. Angland: Just a moment, Mr. Hay. We will again object to this evidence, your Honor, as the matter has already been adjudicated in this Court, and in line with what the Court said, this is the third witness called for the same purpose.

Court: I will let in testimony to add to it. I don't see where he gains anything after all, but we will let him go ahead with it. This is the last one, though. I am not going to let you go into it any further.

A. All I know is what I heard them say in Benny Martelli's. [250]

Q. If you can, if you know, what is his reputation for truth and veracity in this vicinity, that is, what people think?

A. I would say bad.

### Cross-Examination

By Mr. Pease:

Q. Who did you discuss his reputation with?

A. Different people.

Q. Who, name one? Name a person you discussed his reputation with before you came into the courtroom here?

A. Benny Martelli, Sam Catrino—(interrupted)

Mr. Pease: Sam Catrino. That's all.

Mr. Higgins: You asked for the names of persons. If there were others, he can say so.



(Testimony of J. W. Hay.)

Re-Direct Examination

By Mr. Taylor:

Q. You have answered his reputation for truth and veracity is bad. You have stated you have heard other people say it was. Do you restrict that to the one person you named who you talked to about it?

A. I have heard different people talk about that.

Q. Recently or over a period of time?

A. I would say over a period of time.

Q. You were formerly in the stock business, were you not, a stock raiser?

A. I was before I moved to Missoula. [251]

Q. In Ravalli County? A. Yes.

Q. Did you know Mr. Rennaker there?

A. Yes.

Re-Cross Examination

By Mr. Pease:

Q. Are you a friend of Sam Catrino's?

A. Yes.

Q. A business associate of his?

A. I am like anybody else, yes.

Q. A business associate of his? A. No.

Q. Have you been in the past a business associate of his? A. No.

Q. Did he ask you to come and testify?

A. He sent me a subpoena to come.

Mr. Pease: That is all.

Mr. Taylor: That is all.

(Witness excused.)

TOM MANGIN,

called as a witness on behalf of the defendants,  
being first duly sworn testified as follows:

Direct Examination.

By Mr. Higgins: [252]

Q. State your name, please.

A. 'Thomas A. Mangin.

Q. Where do you reside? A. 404 Alder.

Q. How long have you lived in Missoula?

A. Since 1918.

Q. Are you acquainted with Sam Catrino?

A. Yes.

Q. How long have you known him?

A. I have been his neighbor for eight years, just  
a fence between us.

Q. How long have you known him in addition  
to that, Tom?

A. Well, I have known him since 1928.

Q. Have you known him rather intimately?

A. No.

Q. You have lived neighbors to him for some  
time? A. Just neighbors.

Q. Do you know his reputation in this com-  
munity for truth and veracity?

A. All I know about Sam—(interrupted)

Mr. Pease: Just a minute, the question calls for  
a yes or no answer.

Court: Yes, that's right.

Q. Do you know his reputation in this com-  
munity for truth and veracity? [253]

(Testimony of Tom Mangin.)

A. I do.

Q. What is it, good or bad?

A. As far as I know, he is one of the best neighbors I ever had.

Mr. Pease: Just answer the question, please, witness.

Cross Examination.

By Mr. Pease:

Q. Are you a business neighbor of his? Does your business adjoin his business? A. No.

Q. Do you have any business interests in that end of town? A. Yes, I have.

Q. Does the good reputation of Mr. Catrino extend to the Brunswick Bar and the Brunswick Hotel, which he owns?

A. I can't tell you anything about his business.

Q. You have no opinion on that?

A. I don't know anything about his business. The only thing I know, he is my neighbor, a wonderful neighbor, and his family.

Q. You don't know what the reputation of the saloon and the second floor above it is then, generally, in the City of Missoula?

A. No, I don't. The actual truth is I don't, because I don't know anything about anybody's business other than my own.

Q. You never heard a rumor that there was—  
(interrupted) [254]

Mr. Higgins: Just a moment—(interrupted)

Q. What is your business?

(Testimony of Tom Mangin.)

A. I run Mangin's Chicken Inn and Double Front Bar on Railroad Avenue.

Q. Railroad Avenue?

A. Next to the Park Hotel.

Q. Catrino runs another saloon in the same vicinity?

A. Practically, about three blocks away.

Mr. Pease: That is all.

Mr. Taylor: That's all.

(Witness Excused)

ROY F. WORDEN,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Higgins:

Q. State your name, please.

A. Roy F. Worden.

Q. Where do you reside, Mr. Worden?

A. 215 East Spruce Street.

Q. How long have you lived in Missoula?

A. Since 1899.

Q. 1899?           A. That's right. [255]

Q. What business are you engaged in?

A. I run a super-market grocery business.

Q. Are you acquainted with Sam Catrino?

A. Yes.

Q. How long have you known him?

A. I think about 1930.

(Testimony of Roy F. Worden.)

Q. Do you know his reputation in this community for truth and veracity?

A. As far as my dealings with him, he has been honorable.

Q. Would you say he enjoyed a good reputation in this community?

Mr. Pease: That is objected to as a leading question and improper foundation.

Court: Yes, that has already been answered.

Mr. Higgins: That is all.

Cross Examination.

By Mr. Pease:

Q. All that you have to say, Mr. Worden, is that he pays his bills at your store?

A. He has never owed me any and I have never owed him any.

Q. You have nothing to say about the reputation of his business or the manner in which he makes his living at his place of business on Woody Street?

A. I don't know anything about that.

Q. You don't know anything about the reputation of that place [256] either, I suppose?

A. I wouldn't say.

Mr. Pease: That is all.

(Witness Excused)



JOHN W. LOWELL,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Higgins:

Q. State your name, please.

A. John W. Lowell.

Q. Where do you reside, Mr. Lowell?

A. 2217 Hilda.

Q. In the City of Missoula?

A. That is outside the city limits.

Q. You are retired from the United States Forest Service?      A. Yes.

Q. You were formerly the Forest Service Supervisor at Hamilton?      A. Yes.

Q. Do you know Sam Catrino?      A. I do.

Q. How long have you known him?

A. About 12 years. [257]

Q. Do you know his reputation in this community for truth and veracity?

A. I never have heard any comments by other people about it.

Mr. Angland: Just a minute, we object to any further answers. He has never heard any comment, that is the answer to your question, your Honor.

Court: Yes, I believe it ends with that answer. Anything further?

Mr. Higgins: That is all.

Court: Any cross examination?

Mr. Angland: No cross examination.

(Witness Excused)

J. B. HAVILAND,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Higgins:

Q. State your name, please.

A. J. B. Haviland.

Q. Where do you reside?

A. 242 East Beckwith.

Q. How long have you lived in Missoula?

A. Sixty years yesterday.

Q. Sixty years yesterday? [258]

A. Yes.

Q. Are you acquainted with John Reinhard?

A. Yes.

Q. He worked for you about how many years?

A. About 20 years.

Q. Do you know his reputation in this community for truth and veracity?

A. Very good.

Mr. Higgins: You may cross examine.

Cross Examination.

By Mr. Pease:

Q. What is your occupation?

A. Contractor.

Q. Have you had business relations with Sam Catrino?      A. No.

Q. Do you patronize his place of business?

A. Never was in it.

Q. Has his place of business a good reputation?

(Testimony of J. B. Haviland.)

Mr. Higgins: We are not now dealing with the reputation of the Brunswick Bar.

Mr. Pease: I am on cross examination.

Mr. Higgins: It isn't proper cross examination.

Mr. Pease: You were asking about Reinhard. I will withdraw that.

Q. With whom have you discussed John Reinhard's reputation? [259]

A. Nobody, he worked for me for 20 years.

Q. Have you discussed his reputation with anybody? A. Certainly not.

Q. All you are telling here is based on some personal opinion, is that it?

A. If you have a man around twenty years, you ought to know him.

Mr. Pease: I move to strike all evidence of the witness on the ground it isn't reputation at all.

Court: Reputation, you know, is what people talk about, say about another. All you know about him is that he worked for you for 20 years?

Witness: Yes, and I never heard anybody say a word against him.

Mr. Pease: No further cross examination.

(Witness Excused)

A. E. RYNERDSON,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Taylor:

Q. You may state your name to the jury.

A. A. E. Rynerdson, Hot Springs, Montana.

Q. Camas? [260]

A. Hot Springs.

Q. How long have you lived in that vicinity?

A. I came there in 1928.

Q. 1928, that would be 20 years. Are you acquainted with Pat Pierre? A. Yes, sir.

Q. How long have you known him?

A. A good many years, since he was a little boy.

Q. Do you know his reputation in that community for truth and veracity? A. Yes, sir.

Q. Is it good or bad? A. Bad.

Mr. Taylor: You may examine.

Mr. Pease: No cross examination.

(Witness Excused)

WARD WINEBRENNER,

called as a witness on behalf of the defendants,  
being first duly sworn, testified as follows:

Direct Examination.

By Mr. Taylor:

Q. Where do you live, Mr. Winebrenner?

A. Hot Springs, Montana.

Q. Is that what we call Camas Hot Springs?

A. Camas is right close to it, about a mile.

(Testimony of Ward Winebrenner.)

Q. How long have you lived there?

A. I come there September 10, 1939.

Q. What is your business?

A. Saw mill work and deputy sheriff.

Q. I will ask you if you are acquainted with Pat Pierre?

A. Truthfully I don't believe I am.

Q. I beg your pardon.

A. Truthfully, I don't think I am with Pat Pierre. I know one of his brothers, but I don't think I know him.

Q. Do you know of him?

A. Well, not in particular, I don't believe I do.

Mr. Taylor: That is all.

(Witness Excused)

Mr. Higgins: Your Honor, I wonder if we could have a few minutes recess and I think we will expedite the conclusion of our witnesses.

Court: Very well, we will take about 15 minutes.

(Whereupon, at 11:05 a.m. July 9, 1948, a 15 minute recess was taken.)

Court: Gentlemen, are you ready to proceed?

Mr. Taylor: We will rest, if the Court please.

Court: Any rebuttal, gentlemen?

Mr. Pease: If your Honor please, we have no rebuttal. In view of the fact we can undoubtedly finish the case today, we [262] would like an opportunity to prepare some requested instructions for your Honor's consideration, and present them at 1:30 or 2 o'clock this afternoon. I have been



interrupted a dozen times in attempting to get these instructions prepared.

Court: Of course, counsel on both sides know instructions shouldn't be given to the Court at the last minute. Thus far, I haven't had requested instructions from either side, so I have had to prepare some myself. I don't know whether you have prepared some.

Mr. Higgins: We have prepared some.

Court: How many?

Mr. Higgins: Eighteen or twenty.

Court: You can't hand them to me at the last minute, you better cut them down.

Mr. Higgins: Most of these, your Honor, are on reasonable doubt.

Court: All right, I'll look at them and see if you have any special instructions. I'll look at them and see if I'll give them. That will go for counsel on the other side. I didn't know anything about it, not having heard anything about it. How long do you want to argue the case?

Mr. Pease: I would say for the two of us an hour.

Court: Are you both going to argue for the defense?

Mr. Taylor: I think an hour on a side.

Court: Very well, I think we ought to figure on an hour [263] to a side. That should be sufficient.

Mr. Higgins: Your Honor, before the jury is excused, I wonder if I might be permitted to file

a second motion for judgment of acquittal?

Court: Is it on the same grounds?

Mr. Higgins: Yes, your Honor.

[Title of Court and Cause.]

## MOTION FOR JUDGMENT OF ACQUITTAL

Come Now the Defendants and move the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the evidence is insufficient to maintain a conviction under Count Number One of the Indictment against the Defendants, Sam Catrino and John A. Reinhard, or either.

2. That the evidence is insufficient to maintain a conviction under Count Number Two of the Indictment against the Defendants, Sam Catrino and John A. Reinhard, or either.

3. That the evidence is insufficient to maintain a conviction under Count Number Three of the Indictment against the Defendant, John A. Reinhard.

J. D. TAYLOR,

GEORGE F. HIGGINS,

Attorneys for Defendants.

Court: I will overrule the motion.

Mr. Higgins: May we have an exception?

Court: Certainly. The Court will stand in recess [264] until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m., July 9, 1948, at which time the following proceedings were had.)

Court: Are you gentlemen ready to proceed with your argument?

Mr. Pease: Yes, your Honor.

Mr. Pease made the opening argument on behalf of the government.

Mr. Higgins and Mr. Taylor each argued the case on behalf of the defendants.

Mr. Angland made the closing argument on behalf of the government.

(Whereupon, at 4:05 p.m. a 15 minute recess was taken.)

Court: Ladies and gentlemen of the jury, you have heard about two hours discussion of the facts by counsel on both sides of the case, for the government and for the defendants, after having heard the evidence in the case as presented to you by the witnesses, and at this stage of the proceedings, it becomes the duty of the Court to advise you as to the rules of law that the Court deems applicable to a state of facts such as we have heard here in this case and under the charge presented by this indictment.

In the first place, the Court advises the jury that they are the sole judges of the facts. The Court judges the rules of [265] law that shall be given the jury in order that they, perhaps, may more readily reach a conclusion or verdict in the case. Now, these rules—or the Court endeavors to make them as free from legal verbiage or legal phraseology as possible so that they will be easily understood and can be as easily applied.

Now, you judge the facts in the case, the credibility of witnesses, the weight to be given the testimony, and the weight to be given circumstances that always follow in the wake of verbal testimony, and that sometimes is quite important and helps explain the verbal testimony that you have heard from the stand, or at any rate, may throw some light upon it.

Now, in this case, these defendants have been charged by an indictment found by the Grand Jury with subornation of perjury and with obstruction of justice and with attempting to influence a witness. These are all set out in three counts, Count No. 1, subornation, Count No. 2, Obstruction of Justice, Count 3, attempting to influence a witness. Now, it has been some time since the contents of this indictment was brought to your attention by the District Attorney, and I feel that perhaps I should read these counts over to you again, so that the further instructions that I expect to give—well, that the charges, at any rate, will be more clearly and recently in your mind as other instructions are given to you.

“Count One, Subornation of Perjury, Title 18, 232. The above named defendants, Sam Catrino, and John A. Reinhard, on [266] or about March 13, 1946, at Missoula, in the District of Montana, and within the jurisdiction of this court, did unlawfully, corruptly and feloniously, procure one James B. Remmaker to commit perjury as follows: The said defendants, Sam Catrino and John A. Reinhard,

were charged in the District Court of the United States for the District of Montana, with a crime against the sovereignty of the United States, to-wit, violation of Section 241 of Title 24, U.S.C.A., viz., an unlawful sale of liquor to an Indian ward of the government, alleged to have been committed on October 20, 1945, at a saloon known as the Brunswick Bar in Missoula, Montana; said cause came on for trial on March 13, 1946; on and prior to said date, the said defendants, Sam Catrino and John A. Reinhard, solicited, procured and caused the said James Rennaker to appear as a witness in the said United States District Court on March 13, 1946, upon the trial of said cause and to be by the Clerk of said Court sworn as a witness in said cause and to testify that he, the said James B. Rennaker, on the late evening of October 20, 1945, was in the said Brunswick Bar and there saw a Mexican person buy a quantity of wine at the bar of said saloon, and deliver the same to one Pat A. Pierre; that said testimony so given was false and known by the defendants Sam Catrino and John A. Reinhard, and by the said James B. Rennaker, to be false; that in truth and in fact, said James B. Rennaker was not in said place, nor in the City of Missoula at the time [267] referred to, to-wit, the late evening of October 20, 1945, but was in or near the City of Butte, Montana, and that in truth and in fact, he did not see any person sell any wine or other liquor to the Indian ward, Pat A. Pierre, on October 20, 1945."



That is Count 1 of the indictment, and that count is based upon the statute referred to, which reads as follows:

“Section 232 of the United States Codes Annotated, Title 18, Subornation of Perjury. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in Section 231 of this title prescribed.”

Now, Section 231 of the same title is as follows:

“Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years.”

That is the statute upon which Count 1 is based.

Now, Count 2 is obstruction of justice. That is Title 18, Section 241.

“The above-named defendants, Sam Catrino and John A. Reinhard, on or about March 13, 1946, at Missoula, Montana, in [268] the District of Montana and within the jurisdiction of this Court, did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the

District of Montana, then in session and engaged in the trial of a cause entitled, 'United States of America, vs. Sam Catrino and John A. Reinhard,' wherein said defendants were charged with and being tried for a violation of section 241 of Title 25 of the United States Code, to-wit: An unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian ward of the United States; particularly in this, that said defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and testify as a witness for the said defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, to-wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre."

The statute upon which that is based is number 241, title 18:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate or impede any party or witness, in any court [269] of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such

commissioner, or who shall injure any party or witness in his person or property on account of his attending or having attended such court or examination before such commissioner or officer, or on account of his testifying or having testified to any matter pending therein, or who shall injure any such grand or petit juror in his person or property on account of any verdict, presentment, or indictment assented to by him, or on account of his being or having been such juror, or who shall injure any such commissioner or officer in his person or property on account of the performance of his official duties, or who corruptly or by threats of force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct or impede, the due administration of justice therein, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

You see, ladies and gentlemen, that that is quite an involved statute and contains several separate and distinct offenses, and two of the offenses there contained are set forth here in count number 2, obstruction of justice, and also the [270] offense of attempting to influence a witness also appears in that same section, and that is set forth in count 3 of the indictment and reads as follows:

"The above named defendants, John A. Reinhard, and John Doe, whose true name is unknown," --his name was afterwards found to be Lester LaValley, and the case was dismissed against him, as you will recall--"described"--he is described in

weight about 145 pounds and was wearing a big cowboy hat and range clothing at the time mentioned—that is a description of the person himself, and the defendant being unknown to the Grand Jury, they set forth a description of him, but it afterwards appeared that his name was Lester La-Valley, and he was set forth as a defendant, and the case was dismissed as to him—“on or about October 20, 1945, in Sanders County, Montana, in the District of Montana and within the jurisdiction of this court, did unlawfully, corruptly and feloniously endeavor to influence one Pat A. Pierre, a witness in a cause entitled, ‘United States of America vs. Sam Catrino and John A. Reinhard,’ then pending in the United States District Court for the for the District of Montana, in which said Catrino and Reinhard were charged with unlawfully selling a quantity of wine to said Pat A. Pierre, an Indian ward of the United States, in that said defendants corruptly offered said Pat A. Pierre a sum of money as a bribe to procure him to testify that a bottle of wine, which was in fact sold to said Pierre by said defendant John [271] A. Reinhard, was sold to said Pierre by a Mexican, and stated to said Pierre that they would back him up in said false testimony.”

That count, as you will recall, now stands only against the defendant John A. Reinhard.

Now, ladies and gentlemen, what I have read to you constitutes the indictment in this case found by the Federal Grand Jury, and this is not to be

considered by you as any evidence whatsoever against these defendants or either of them. It is simply the written form used for the purpose of enlightening all of us who are interested here, such as the jurors, judge, the defendants and their counsel, of the nature of the offense with which these defendants are charged.

This indictment consists of three counts. The jury have the power and authority to find the defendants guilty, one or both of them, of one or more of all of the counts set forth in this indictment. They have the power and authority to find the defendants, one or both of them, not guilty of one or more or all of the counts set forth in this indictment. It all depends upon how the jury, after a careful consideration and discussion of the **evidence**, shall resolve the evidence, just how they find it to be.

Now, these defendants have entered a plea, as you know, of not guilty to all of the counts in this indictment. Under that plea and at the beginning of the trial arises what in law [272] we term the presumption of innocence, which means that the defendants, and both of them, are presumed to be innocent until they are proven guilty beyond a reasonable doubt, as the Court will hereafter define a reasonable doubt to you.

Now, you ladies and gentlemen were selected here to serve on this jury after a very searching **examination by counsel** on both sides, and as I recall, the exercise of all challenges that counsel were



entitled to. They evidently concluded that you were fair minded, that you knew nothing about the facts of the case, that you were not connected with the defendants or related to them in any way, or any of them, or that there was any information you had that should be disclosed and that might show any disqualification. The examination disclosed you had no bias or prejudice against these defendants, or either of them. Your minds were free and open, unbiased, unprejudiced, to receive the testimony and consider it, and after that was over, to retire to your jury room and discuss it carefully and honestly and conscientiously, bearing in mind all the while the presumption of innocence, which follows the defendants throughout the trial of the case and to the jury room, where you will then determine whether, notwithstanding this presumption of innocence with which the law clothes the defendants, the defendants, or either of them, have actually been proven guilty beyond a reasonable doubt.

Now, you have often heard of reasonable doubt. Some of [273] you may have served on juries and you may have heard some long-winded definition given, such as I have years ago in the state courts, of what constitutes a reasonable doubt. It is a very simple matter, and a very simple definition will do, shorn of all that legal phraseology that used to be couched in that definition. The very words themselves explain to your minds what a reasonable doubt is, a doubt for which you can find a reason,

a good reason, a substantial reason, based upon the evidence or the lack of evidence or the character of the evidence. Now, after you have considered all of the evidence in the case, that which is favorable as well as that which is unfavorable, you feel that you have an abiding conviction to a moral certainty of the truth of the charge, then you are said to have no reasonable doubt, and it would be your duty to convict the defendants, one or both of them. And, again, after so considering all the evidence in the case, that which is favorable as well as that which is unfavorable, you feel that you have not an abiding conviction to a moral certainty of the truth of the charge, then it would equally be your duty to acquit the defendants, one or both of them.

You understand, ladies and gentlemen, the effect and force of the words used in that definition, "an abiding conviction to a moral certainty." Suppose we put it another way: a continuing belief to a very high degree of probability, a continuing belief to a very high degree of probability. Now, [274] that will give you the meaning and the application here of the other words I used in that definition.

As you know, it is impossible to make proof to a mathematical certainty, and that is never required under the law in these cases, because it could not be done. No such proof as might be made in mathematics and the sciences governs here in this case or in this Court under these circumstances.

As I said to you at the beginning, you are the

sole judges of the facts in this case. You judge the credibility of the witnesses, the weight to be given the testimony, and the weight to be given such circumstances as may accompany some of the verbal statements made by the witnesses upon the stand. You have an opportunity to see the witnesses before you here when sworn. Note his manner and demeanor as he appears upon the stand. Note whether he is frank and candid and outspoken and apparently endeavoring to tell you the truth, the whole truth and nothing but the truth, or whether he is evasive, sometimes talks in monosyllables, or apparently evades an answer or gives an answer that is not responsive to the question propounded to him, or has a poor memory. All those things you take into account. The only office of a witness in the courtroom is to speak the truth, and the presumption is that the witness is telling you the truth, but that presumption may be repelled by his manner of testifying, by contradictory evidence, or evidence affecting his credibility as a witness. [275] and of all those things you are the sole judges.

If you believe that any witness has come before you on the witness stand here and wilfully testified falsely to some material matter, you have the right to reject that testimony, or perhaps you will find some corroborating testimony in what has been said by some other witness, or you may find such corroborating testimony in circumstances that you have observed during the progress of the trial, so that might modify your judgment as to this particular

witness. There might be some parts of his testimony you would accept and some parts you would reject, and that addresses itself to your own judgment.

Now, you are instructed that the testimony of one witness is sufficient in most of these criminal cases—I mean and should say, the testimony of one credible witness in these cases, in all cases except treason and perjury, and the Court advises you that there should be corroboration under the first count of this indictment; that is, there should be one witness or two witnesses, or there should be, instead of the second witness, a corroborating circumstance which satisfies your mind beyond a reasonable doubt that is, substantial corroboration of the testimony given by the one witness who appeared before you.

As to counts 2 and 3, one credible witness is sufficient, if you believe him, if you have confidence in the testimony [276] given you. What I mean by credible witness is one in whom you do have confidence, one whom you believe is worthy of your consideration and belief, and that again addresses itself to your good judgment as jurors in this case.

Now, there is another element to be considered here, and that is the element of intent, and it is a very important element. In all criminal charges of this kind, the jury must be able to find a union or joint operation of act and intent on the part of the defendants, or criminal negligence. They must find that beyond a reasonable doubt.

Now, "criminal negligence," that phrase used there in that connection means the doing of a thing recklessly, heedlessly and with a disregard of the consequences. Now, none of you ladies and gentlemen, of course, are able to look into the minds of these defendants and determine with what intent they acted, if you believe they acted as charged in this indictment, but you must take into account all of the evidence and circumstances in the case, and then determine from that with what intent they acted, if you believe they acted as charged in this indictment, remembering that every sane person is presumed to intend the natural and usual consequences of his own deliberate act. However, before you can convict the defendants or either of them, you must be satisfied beyond a reasonable doubt that they acted, if they acted at all, with a criminal intent, and I mean by that an evil intent. [277]

Now, then, there are certain special instructions here that have been offered. Some of them I have rejected because some of them were repetitious and might tend to some confusion on the part of the jurors unless further explained, but I have selected a few of these special instructions, which I believe conform to the law in the case and that you should hear.

One of the chief questions in this case is whether James Rennaker testified falsely as a witness for the defendants Catrino and Reinhard in a trial held in this court on March 13, 1946. It was and is established by the verdict and judgment of guilty



upon that trial that Rennaker's testimony then given was false. You are not at liberty to find that the defense made by Catrino and Reinhard on the former trial was true or that Rennaker in that case testified truthfully, because it is finally determined between the United States and the defendants Catrino and Reinhard that their defense was false and and that Rennaker's testimony then given was also false.

If you find that James Rennaker wilfully testified falsely in the trial of Catrino and Reinhard on March 13, 1946, as charged; that he did not believe such testimony to be true; that the defendants knew or believed that the said testimony of Rennaker would be false; that the defendants knew that Rennaker would wilfully testify falsely contrary to his oath, and not believing the testimony to be true; and that the defendants induced or procured Rennaker to give such false testimony, you should find the defendants guilty on Count 1 of the Indictment.

If you find that the defendants, on or about March 13, 1946, caused James B. Rennaker to attend the trial of the defendants Catrino and Reinhard upon a charge of Indian Liquor violation, to be sworn and testify as a witness and to give false testimony, known by the defendants and by said Rennaker to be false, to-wit: testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an unnamed Mexican purchase a

quantity of wine at the bar and deliver it to one Pat A. Pierre, you should find the defendants guilty on count 2 of the indictment.

Count 3 of the Indictment does not concern defendant Catrino, but does concern defendant Reinhard. If you find that defendant Reinhard, on or about December 7, 1945, solicited the witness Pat A. Pierre to testify that a bottle of wine, which was in fact sold to said Pierre by defendant Reinhard, was sold to said Pierre by a Mexican, and that defendant Reinhard knew or believed that such testimony would be false if given, and offered money to said Pierre to so testify, you should find defendant Reinhard guilty on County 3 of the indictment.

You are instructed that you cannot find the defendant guilty in this case upon conjectures—it should read the defendants [279] or either of them in this case—guilty upon conjectures, however shrewd, or upon suspicions, however well-grounded, nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes their guilt beyond a reasonable doubt, that is, upon proof such as logically compels a conviction that the charge is true and the reason for that is that you act on evidence; mere suspicions, probabilities and conjectures are not evidence, they do not rise to the dignity of evidence, and the burden of proof is upon the government in this case to prove the defendants' guilt beyond a reasonable doubt.

You are instructed that if you find that Ren-

naker made a false statement but you have a reasonable doubt as to whether the defendants Sam Catrino and John A. Reinhard caused the same to be made or aided or abetted in the making thereof, you must find the defendants, or either of them, not guilty of the charge contained in counts 1 and 2 of the indictment.

You are instructed that the defendants in this case are not required to prove anything. The burden rests upon the plaintiff, the United States of America, to prove to your satisfaction beyond a reasonable doubt each and every element necessary to constitute the crime as charged in each count of the indictment herein; and if, after considering all of the evidence in the case, together with the presumption of innocence, you have a reasonable doubt of the existence of one or more of [280] these elements, your verdict must be not guilty.

You are instructed that the defendants come into Court protected by the presumption of law that they are innocent of any crime and particularly the crime or crimes charged against them in the Indictment. The defendants are presumed to be innocent until their guilt is established beyond a reasonable doubt. This presumption attends them at every step throughout the entire case, and to its benefits they are entitled in deciding every question of fact. That they have been suspected and charged with the perpetration of crimes does not in any degree tend to show their guilt or remove from them this presumption of innocence which the law

throws about them. The indictment in this case is only a formal written accusation of crime required as an essential preliminary to a trial, but in itself is not any evidence of crime. It is merely a formal charge for the purpose of putting the defendants upon trial and should not influence you in arriving at your verdict, nor should it be allowed to in any way prejudice you against the defendants, but you should determine their guilt or innocence by a careful consideration of all the evidence introduced in the case during the trial.

You are instructed that to this indictment the defendants have pleaded not guilty, and under that plea they deny every material allegation of the indictment against them. No presumption of law is raised against them, but every presumption [281] of law is in favor of their innocence, and in order to convict them of the crimes charged against them every material fact necessary to constitute such crimes must be proven by the government by competent evidence, beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any fact or element necessary to constitute the crime charged, it is your duty to give the defendants the benefit of such doubt and acquit them.

You are instructed that when two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence, and in that event should find the defendants not guilty. That is, where two con-

clusions can be drawn as reasonably one way as the other, one pointing to guilt and one to innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence.

You are instructed that before you can find the defendant Sam Catrino guilty under count one of the indictment, the government must establish beyond a reasonable doubt that he procured and caused James Rennaker to testify falsely. This fact must be established by two independent witnesses or one witness and corroborating evidence, and unless this has been done, you must find the defendant Sam Catrino not guilty.

You are instructed that before you can find the defendant John A. Reinhard guilty under count one of the indictment, the government must establish beyond a reasonable doubt that he [282] procured and caused James Rennaker to testify falsely. This fact must be established by two independent witnesses, or one witness and corroborating evidence. Unless this has been done, you must find the defendant John A. Reinhard not guilty.

That refers, as I have shown you, to count one of the indictment.

I have called your attention to the intent.

Evidence has been introduced here as to reputation of certain of the defendants and of two of the witnesses. You know, of course, without my giving you any legal definition of it that good repute, good reputation always goes to ones credit, and the ques-



tion for the jury is to determine whether one of good reputation would or would not be likely to commit such a crime as has been charged against these defendants here. It is for you to analyze that reputation testimony and decide just what weight you are going to give to it under all the circumstances of the case, and you will remember in the same connection that reputation testimony, such as you have heard here, will not override a case made out by the government against the defendants, or either of them, beyond a reasonable doubt.

Now, this testimony has been given as to the reputation of Rennaker and Pat Pierre to the effect that such reputation is bad. Well, of course, that is the contrary of good reputation or good repute, that goes to the bad character and bad reputation [283] of Rennaker and Pierre. It is for you to consider the reputation thus given and all of the circumstances connected with the giving of such testimony, and it is for you to say what weight you are going to give it and just how much it is going to affect your judgment in determining the truth or falsity of the testimony given by Rennaker and Pat Pierre. You must take all those things into account, because there may be circumstances that will show you that in some instances considerable weight should be given, and in other instances not very much.

Now, I think, without going over any further instructions, that I have covered all of the main features of this case, so that you will understand how these rules are to be applied when you go into

the jury room and discuss the evidence. It sometimes happens that the Court enters upon a discussion of the evidence with the jury. That is sometimes called comments by the Court on the evidence. Such a thing is permitted in the Federal Courts, although not in the State Courts. Sometimes the Court does comment, and sometimes not. It seems to me that counsel, these four lawyers in this case who have talked to you for two hours, have gone into pretty nearly every phase of the evidence that you will need to consider, and have reminded you of what you must take into account and discuss when you retire to the jury room, and if I should begin now to talk about some of the evidence, it would be repetitious and I feel very tiring, [284] and I doubt whether it would avail very much in view of these able talks that have been made by the four members of the bar who have engaged in this trial.

You know you ought to, in your discussions, reconcile the evidence in the case. You are bound to find conflicts, and, of course, where you do find conflicts, you must reconcile them if possible. You recall that these two defendants took the stand and entered their denials. Well, there was a time when defendants in criminal cases were not allowed to take the stand. They were required to stand mute. I suppose most of the important changes made in the criminal laws during the past three or four hundred years have been of such nature as to enable the defendant to better protect himself and offer his defense when charged with crime. Now,

I said these two defendants have appeared here and given their testimony. Well, the presumption that they are speaking the truth would apply in the instance of the defendants the same as in the instance of any other witness testifying before the jury, but, of course, in estimating their weight and testimony, you must also take into account the nature of the charge, the seriousness of the charge against the defendants, and what it would mean to them if a verdict of guilty should be returned against them. That is something also for you to consider in weighing the testimony of the defendants, whether you believe they have given you a truthful version of the matters related by them upon the witness [285] stand. However, it is your duty to consider their testimony just the same as you would all other evidence that has been presented to you in the case, and determine from that whether you believe they have been proven guilty, or one of them, or either of them, beyond a reasonable doubt, and you should consider such testimony seriously and conscientiously.

Now, in regard to conflicts, you are bound to find them here. It is your duty to reconcile conflicts in evidence whenever it seems possible for you to do so, but wherever you find or determine that these conflicts appear to be irreconcilable, then you must take the testimony that you consider the most worthy of your belief and give it such weight as you think it ought properly to receive.

Now, it takes twelve of your number to agree on a verdict, and when you retire, you should select

one of your number to act as foreman and he will sign your verdict when you agree.

The exhibits that have been introduced in the case will be given you for inspection and consideration if you so desire, likewise a copy of the indictment, and also forms of verdict will be furnished the jury.

Are the bailiffs sworn?

Clerk: No, your Honor.

Court: Let the bailiffs come forward and be sworn.

(Bailiffs sworn.)

Court: Well, gentlemen, you can now come and meet with [286] the stenographer and make your exceptions to the charge to the jury. You must do it without the jury hearing you, in the presence of counsel for both sides and the Court here.

(The following proceedings were had out of hearing of the jury and in the presence of the Court and counsel for the respective parties:)

Mr. Angland: The government has no exception or objection to the charge given.

Mr. Higgins: We except to that portion of the charge wherein the Court failed to charge the jury that there would have to be some corroborating evidence under count number two, for it is our contention that said count in reality states a charge of subornation of perjury, and the count could not be proven or established without corroborating evidence to support the testimony of James Remmaker.

An exception is made to the Court's charge in charging the jury as to count three, in that the charge was given in connection with the charge against Catrino under counts number one and two. It is our contention that the charge to the jury under count three, wherein Catrino is not a defendant, is prejudicial to him in his having a fair trial under counts one and two.

Court: All right, the jury may now retire to deliberate. Court will stand in recess awaiting the verdict. Probably they will want to go to dinner and you will want to go to dinner. [287]

Here, Mr. Walker, are the papers in the case, the indictment and the specific instructions requested. The instructions given are marked with a "V"—no, the instructions given are marked with an "O" and the instructions not given are marked with a "V". You may file them in the case.

Plaintiff's requested instructions given by the Court:

## O

### PLAINTIFF'S REQUESTED INSTRUCTION

#### No. 1

One of the chief questions in this case is whether James Rennaker testified falsely as a witness for the defendants Catrino and Reinhard in a trial held in this court on March 13, 1946. It was and is established by the verdict and judgment of guilty upon that trial that Rennaker's testimony then given was false. You are not at liberty to find that the defense made by Catrino and Reinhard on the former trial was true or that Rennaker in that case



testified truthfully, because it is finally determined between the United States and the defendants Catrino and Reinhard that their defense was false and that Rennaker's testimony then given was also false.

Given,

CHARLES N. PRAY,  
Judge.

O

PLAINTIFF'S REQUESTED INSTRUCTION  
No. 2

If you find that James Rennaker wilfully testified falsely [288] in the trial of Catrino and Reinhard on March 13, 1946, as charged; that he did not believe such testimony to be true; that the defendants knew or believed that the said testimony of Rennaker would be false; that the defendants knew that Rennaker would wilfully testify falsely contrary to his oath, and not believing the testimony to be true; and that the defendants induced or procured Rennaker to give such false testimony, you should find the defendants guilty on Count One of the Indictment.

Given,

CHARLES N. PRAY,  
Judge.

Hallock vs. U.S., 185 U.S. 417.

O

PLAINTIFF'S REQUESTED INSTRUCTION  
No. 3

If you find that the defendants on or about March 13, 1946, caused James B. Rennaker to attend the trial of the defendants Catrino and Reinhard upon

a charge of Indian Liquor Violation, to be sworn and testify as a witness and to give false testimony, known by the defendants and by said Rennaker to be false, to-wit: testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1935, and there saw an unnamed Mexican purchase a quantity of wine at the bar and deliver it to one Pat A. Pierre, you should find the defendants guilty on Count Two of the Indictment.

Given,

CHARLES N. PRAY,  
Judge. [289]

O

PLAINTIFF'S REQUESTED INSTRUCTION  
No. 4

Count Three of the Indictment does not concern defendant Catrino, but does concern defendant Reinhard. If you find that defendant Reinhard on or about December 7, 1945, solicited the witness Pat A. Pierre to testify that a bottle of wine, which was in fact sold to said Pierre by defendant Reinhard, was sold to said Pierre by a Mexican, and the defendant Reinhard knew or believed that such testimony would be false if given, and offered money to said Pierre to so testify, you should find defendant Reinhard guilty on Count Three of the Indictment.

Given,

CHARLES N. PRAY,  
Judge.

Defendants' requested instructions given by the Court:

O

## INSTRUCTION No. ....

You are instructed that you can not find the defendant guilty in this case upon conjectures, however shrewd, or upon suspicions, however well-grounded, nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes their guilt beyond a reasonable doubt—that is, upon proof such as logically compels a conviction that the charge is true and the reason for that is that you act on [290] evidence; mere suspicions, probabilities and conjectures are not evidence; they do not rise to the dignity of evidence, and the burden of proof is upon the Government in this case to prove the defendants' guilt beyond a reasonable doubt.

Given,

CHARLES N. PRAY,

Judge.

O

## INSTRUCTION No. ....

You are instructed that if you find that Rennaker made a false statement but you have a reasonable doubt as to whether the defendants, Sam Catrino and John R. Reinhard, caused the same to be made or aided or abetted in the making thereof, you must find the defendants, or either of them, not guilty of the charge contained in Counts One and Two of the indictment.

Given,

CHARLES N. PRAY,

Judge.

O

## INSTRUCTION No. ....

You are instructed that the Defendants in this case are not required to prove anything. The burden rests upon the Plaintiff, the United States of America, to prove to your satisfaction, beyond a reasonable doubt, each and every element necessary to constitute the crime as charged in each Count of Indictment herein and if, after considering all of the evidence in the case, together with the presumption of innocence, you [291] have a reasonable doubt of the existence of one or more of these elements, your verdict must be not guilty.

Given,

CHARLES N. PRAY,  
Judge.

O

## INSTRUCTION No. ....

You are instructed that the Defendants come into Court protected by the presumption of law that they are innocent of any crime and particularly the crime or crimes charged against them in the Indictment. The Defendants are presumed to be innocent until their guilt is established beyond a reasonable doubt. This presumption attends them at every step throughout the entire case, and to its benefits they are entitled in deciding every question of fact. That they have been suspected and charged with the perpetration of crimes does not in any degree tend to show their guilt or remove from this presumption of innocence which the law throws about them. The indictment in this case is

only a formal written accusation of crime required as an essential preliminary to a trial, but in itself is not any evidence of crime. It is merely a formal charge for the purpose of putting the defendants upon trial and should not influence you in arriving at your verdict, nor should it be allowed to in any way prejudice you against the defendants, but you should determine their guilt or innocence by a careful consideration of all the evidence introduced in the case during [292] the trial.

Given,

CHARLES N. PRAY,  
Judge.

O

INSTRUCTION No. ....

You are instructed that to this Indictment the defendants have pleaded not guilty, and under that plea they deny every material allegation of the Indictment against them. No presumption is raised by the law against them, but every presumption of law is in favor of their innocence, and in order to convict them of the crimes charged against them every material fact necessary to constitute such crime must be proven by the government by competent evidence, beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any fact or element necessary to constitute the crime charged, it is your duty to give the defendants the benefit of such doubt and acquit them.

Given,

CHARLES N. PRAY,  
Judge.



O

## INSTRUCTION No. ....

You are instructed that when two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence, and in that event should find the [293] Defendants not guilty. That is where two conclusions can be drawn as reasonably one way or the other, one pointing to guilt and one to innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence.

Given,

CHARLES N. PRAY,

Judge.

O

## INSTRUCTION No. ....

You are instructed that before you can find the Defendant Sam Catrino guilty under Count One of the Indictment, the Government must establish beyond a reasonable doubt that he procured and caused James Rennaker to testify falsely. This fact must be established by two independent witnesses or one witness and corroborating evidence, and unless this has been done you must find the defendant Sam Catrino not guilty.

Given,

CHARLES N. PRAY,

Judge.

O

## INSTRUCTION No. ....

You are instructed that before you can find the Defendant, John A. Reinhard, guilty under Count

One of the Indictment, the Government must establish beyond a reasonable doubt that he procured and caused James Rennaker to testify falsely. This fact must be established by two independent witnesses, or one witness and corroborating evidence. Unless this has been [294] done you must find the Defendant, John A. Reinhard, not guilty.

CHARLES N. PRAY,  
Judge.

Defendants' requested instructions not given by the Court:

V.

INSTRUCTION No. ....

You are instructed that a Defendant charged with crime is presumed to be innocent and that as the Defendants come into Court presumed to be innocent and that presumption protects them until such time when the jury shall believe from the evidence beyond a reasonable doubt that the defendants are guilty as charged in the Indictment.

The guilt of an accused is not to be inferred because the facts proved are consistent with his guilt but on the contrary, before there can be a verdict of guilty against these two Defendants, or either of them, under any of the Counts in which they are charged, you must believe beyond a reasonable doubt that the facts proved are not consistent with their innocence, and if two conclusions can be rea-

sonably drawn from the evidence, one of innocence and one of guilt, you should adopt the former.

Not Given.

CHARLES N. PRAY,  
Judge. [295]

V.

INSTRUCTION No. ....

You are instructed that no juror should surrender his deliberate, conscientious conviction merely at the behest of a majority of jurors or for the sake unanimity, but as long as any juror has a reasonable doubt as to the guilt of the Defendants, or any of them, such juror should continue to vote not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.

V.

INSTRUCTION No. ....

You are instructed that in every criminal or public offense there must be a union or joint operation of act and intent and both of these elements, viz.: act and intent must not only exist but must be proven in this case to the satisfaction of your mind beyond a reasonable doubt, else you must find the Defendants not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that at no time does it devolve upon the Defendants to prove their innocence or even to raise a reasonable doubt in your minds as to their guilt, but the burden [296] is at all times upon the United States of America to prove beyond a reasonable doubt that the Defendants are guilty as charged in the Indictment, and, if that has not been done, your verdict must be not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that the Defendants have the right to present testimony as to the reputation of the witness, Pierre, and if you find that his reputation for truth and veracity is bad, you must take that into consideration in arriving at your verdict.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that the defendants have the right to present testimony as to the reputation of the witness, Rennaker, and if you find that his

reputation for truth and veracity is bad, you must take that into consideration in arriving at your verdict.

Not Given.

CHARLES N. PRAY,

Judge. [297]

V.

INSTRUCTION No. ....

You are instructed that in Counts I & II that the Government must establish the falsity of the statement alleged to have been made by the Defendant, Rennaker, under oath, by the test of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the Defendants not guilty.

Not Given.

CHARLES N. PRAY,

Judge.

V.

INSTRUCTION No. ....

You are instructed that to convict any of the Defendants charged in this Indictment, probable or credible evidence is not enough.

Not Given.

CHARLES N. PRAY,

Judge.



## V.

## INSTRUCTION No. ....

You are instructed that evidence of previous good character is competent in favor of the Defendants as tending to show that they would not be likely to commit the crimes charged against them, and if, after a careful and thorough consideration of all of the evidence in this case, including that bearing upon their good character, you entertain a reasonable [298] doubt of the Defendant's guilt, then you must acquit him.

Not Given.

CHARLES N. PRAY,

Judge.

## V.

## INSTRUCTION No. ....

You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice tends to connect the Defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof; and in this connection you are further instructed that if you believe from the evidence that James Rennaker did testify falsely as charged in the indictment, you are instructed as to this feature of the case, that James Rennaker and John Reinhard were accomplices.

Not Given.

CHARLES N. PRAY,

Judge.

## V.

## INSTRUCTION No. ....

You are instructed that a witness who is false in one part of his testimony is to be distrusted in others.

Not Given.

CHARLES N. PRAY,  
Judge. [299]

## V.

## INSTRUCTION No. ....

You are instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his creditability.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that 2 forms of verdict will be handed you and you will sign the form that is appropriate after you have deliberated and determined whether the Defendants are or are not guilty. You

have a right under the facts to return either a verdict of guilty or not guilty as you view the evidence and think it should be.

Not Given.

CHARLES N. PRAY,  
Judge.

V.

INSTRUCTION No. ....

You are instructed that there is testimony on behalf of the Defendants that their reputation for honesty and integrity [300] in the community in which they live is good. If you believe from the testimony that prior to the time of the alleged offense for which the Defendants are now on trial each bore a good reputation in the community where he resided for truth, honesty and integrity, that is a circumstance in their favor which you must consider with all facts and circumstances in evidence. It is competent testimony and you should take it and consider it with all the other evidence and give it such weight as appeals to your judgment.

Not Given.

CHARLES N. PRAY,  
Judge.

V.

INSTRUCTION No. ....

You are instructed that a reasonable doubt is what the term implies. It is a doubt founded upon reason. It is a doubt that arises from the evidence

and its condition; something in the evidence that creates a doubt in your mind. It does not mean every conceivable doubt. It doesn't mean a doubt that may be purely imaginary, fanciful, or arising from caprice or speculation. It simply means an honest doubt that appeals to reason and is founded upon reason, and, if after considering the evidence in this case you have such a doubt in your mind that would cause you to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates as a reasonable doubt. [301] You will then resolve that doubt in favor of the Defendants and find them not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.

V.

INSTRUCTION No. ....

You are instructed that the burden is on the government to prove the essential facts set out in this Indictment to your satisfaction beyond a reasonable doubt before you can lawfully return a verdict of guilty in the case, and that burden never shifts.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that when a witness has been contradicted by showing that he made inconsistent statements at another time, the previous contradictory statements are not evidence of the facts related in such statements. The fact that the witness has made contradictory statements may be considered by you in considering the credibility of the witness, but the subject matter of the previous contradictory statements inconsistent with the testimony on the trial cannot be considered as evidence of the facts stated in such previous statements.

Not Given.

CHARLES N. PRAY,  
Judge. [302]

## V.

## INSTRUCTION No. ....

You are instructed that where, in the consideration of the evidence in a criminal case, the jury concludes that upon such evidence it cannot say whether the Defendants are guilty or not guilty, then it is the duty of the jury to return a verdict of not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.



## V.

## INSTRUCTION No. ....

You are instructed that under the First and Second Counts of the Indictment, each essential element of the case must be proven by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses are relied upon that each of the witnesses testified to different elements of the crime charged, but the law required in such case that two witnesses testify to each of the essential elements of the crime charged or that one witness has testified directly to such element and that the testimony of such witness is corroborated by the circumstances.

It is therefore necessary for you to understand what is meant by the word "corroborate" and "corroboration." To corroborate means to strengthen; to make certain; to add [303] weight or credibility to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the Defendant's guilt independent of the evidence which is corroborated.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that when a witness has been contradicted by showing that he made inconsistent statements at another time, the previous contradictory statements are not evidence of the facts related in such statements. The fact that the witness has made contradictory statements may be considered by you in considering the credibility of the witness, but the subject matter of the previous contradictory statements inconsistent with his testimony on the trial cannot be considered evidence of the facts stated in such previous statements.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

You are instructed that where, in the consideration of [304] the evidence in a criminal case, the jury concludes that upon such evidence it cannot say whether the Defendants are guilty or not guilty, then it is the duty of the jury to return a verdict of not guilty.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

Now a witness is presumed to speak the truth, but this presumption however may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility. That means when a witness is first sworn and goes on the witness stand you are to believe, as we all do, that he will obey his oath and will tell the truth. That isn't an absolute presumption because we know some people don't tell the truth; so the law says the presumption may be repelled by the manner in which he testifies.

Not Given.

CHARLES N. PRAY,  
Judge.

## V.

## INSTRUCTION No. ....

A witness false in one part of his testimony is to be distrusted in others. That is, if you believe that any witness came on the witness stand and testified falsely as to any [305] material fact in the case, you should distrust all the other evidence that that witness gives.

Not Given.

CHARLES N. PRAY,  
Judge. [306]

In the District Court of the United States,  
District of Montana

United States of America,  
State of Montana—ss.

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, do hereby certify that the foregoing annexed transcript, consisting of 264 pages, exclusive of this certificate, is a true and correct record of the proceedings had in criminal Action No. 6784, United States of America, Plaintiff, vs. Sam Catrino, John A. Reinhard and Lester R. LaValley, Defendants, before the Honorable Charles N. Pray, sitting with a jury, in the Federal Building at Missoula, Montana, on July 7th, 8th and 9th, 1948.

/s/ JOHN J. PARKER,  
Official Court Reporter.

[Endorsed]: Filed Aug. 9, 1948. [307]

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Thereafter on August 9, 1948, an Order extending time within which to file and docket Record on Appeal in the Circuit Court of Appeals was duly filed herein, being in the words and figures following, to-wit: [308]

[Title of District Court and Cause.]

### ORDER

Upon reading the application of counsel for the Defendant, Sam Catrino, for additional time within

which to file and docket the record on appeal in said cause, and the Court being fully advised in the premises, the time within which to file and docket the said record on appeal is hereby extended to the 1st day of September, 1948.

Dated Aug. 9, 1948.

CHARLES N. PRAY,  
Judge.

Entered and noted in Civil Docket August 11, 1948.

[Endorsed]: Filed Aug. 9, 1948. [309]

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Thereafter on August 9, 1948, Designation of Contents of Record was duly filed herein, being in the words and figures following, to-wit: [310]

[Title of District Court and Cause.]

### DESIGNATION

Comes now the defendant, Sam Catrino, and designates the parts of the record in the United States District Court to be contained in the record on appeal, as follows:

1. The indictment on file in this court; the motion of the defendant, Sam Catrino, to dismiss all counts in the indictment, and the minute entry of the court overruling the motion. The oral motion of the defendant to strike count number 2 from the indictment, and the minutes of the court denying the motion. Motion of the defendant to sever count 3 from the indictment, and the minute entry of the court denying the motion; the request to the court to compel the government to elect on which count



it desires to proceed, namely: count 1 or 2, and the minute entries of the court denying the motion, and likewise the motion of the defendant to grant separate trials and the minute entry of the court denying the request; the reporter's transcript of all the testimony had at the trial, including the instructions given and refused. Plaintiff's exhibit, 1, verdict of the jury, the judgment of the District Court, Notice of Appeal; this designation of defendant and appellant's statement of the points; the order of the court relating to the transmission of the original exhibit to the Circuit Court of Appeals.

J. D. TAYLOR,  
GEORGE F. HIGGINS,  
Attorneys for Defendant.

Service of the foregoing designation admitted this 9th day of August, 1948.

HARLOW PEASE,  
EMMETT C. ANGLAND,  
Attorneys for Plaintiff.

[Endorsed]: Filed August 9, 1948. [311]

Thereafter on August 14, 1948, Stipulation as to Contents of Record was duly filed herein, being in the words and figures following, to-wit: [312]

[Title of District Court and Cause.]

### STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the record on appeal shall consist of the papers and documents referred to in the designation of the Defendant and Appellant filed herein.

Dated this 4th day of August, 1948.

J. D. TAYLOR,  
GEORGE F. HIGGINS,  
Attorneys for Defendant and  
Appellant.

HARLOW PEASE,  
EMMETT C. ANGLAND,  
Attorney for Plaintiff.

[Endorsed]: Filed August 14, 1948. [313]

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### CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable The United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing two volumes consisting of 313 pages, numbered consecutively from 1 to 313, inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 6784, United States of America vs. Sam Catrino, et al., required to be incorporated therein by designation of the appellant and by stipulation of the parties, except "The oral motion of the defendant to strike count number 2 from the indictment, and the minutes of the court denying the motion", of which there is no record, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibit No. 1, introduced at the trial of said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-five & 30/100 Dollars (\$35.30) and have been paid by the appellant.

Witness my hand and the seal of said Court at Helena, Montana, this 21st day of August, A.D. 1948.

(Seal)

/s/ H. H. WALKER,

Clerk, U. S. District Court,

District of Montana. [314]

[Endorsed]: No. 11988. United States Court of Appeals for the Ninth Circuit. Sam Catrino, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed August 26, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

Cause No. 11988

UNITED STATES OF AMERICA,  
Plaintiff and Respondent,  
vs.

SAM CATRINO, JOHN A. REINHARD, and  
LESTER R. LaVALLEY,  
Defendant and Appellant.

ADOPTION OF STATEMENT OF POINTS

Comes now the Defendant Sam Catrino and Appellant Sam Catrino and adopts the Statement of Points upon which he intends to rely on the appeal, which was heretofore filed in the District Court of

the United States in and for the District of Montana, and appears as a part of the transcript of record.

/s/ J. D. TAYLOR,

/s/ GEORGE F. HIGGINS,

Attorneys for Defendant and  
Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed August 30, 1948. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

STIPULATION AS TO PRINTED RECORD IN  
THE CIRCUIT COURT OF APPEALS

It is hereby stipulated and agreed that the printed Transcript of Record on Appeal in the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, shall consist of the papers and documents referred to in the Designation of the Defendant and Appellant, filed in the District Court; and in addition thereto shall contain: The **Order of the lower Court** extending the time to file the Record on Appeal and docket the same in the Circuit Court of Appeals; the Order for the Transmission of Exhibit Number One (which Exhibit Number One is not to be printed in the printed



transcript of record); the Adoption of Statement of Points of Defendant and Appellant; and this Stipulation as to printed record on appeal.

Dated this 25th day of August, 1948.

/s/ J. D. TAYLOR,

/s/ GEORGE F. HIGGINS,

Attorneys for Defendant and  
Appellant.

/s/ HARLOW PEASE,

/s/ EMMETT C. ANGLAND,

Attorneys for Plaintiff.

[Endorsed]: Filed August 30, 1948. Paul P.  
O'Brien, Clerk.

IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

SAM CATRINO,

Appellant,

— vs. —

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States  
for the District of Montana.

GEORGE F. HIGGINS,  
JAMES D. TAYLOR,  
Attorneys for Appellant

Filed \_\_\_\_\_, 1947

\_\_\_\_\_. Clerk:



MISSOULIAN

FILED  
OCT 23 1948



No. 11988

IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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SAM CATRINO,

Appellant,

— vs. —

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

---

Upon Appeal from the District Court of the United States  
for the District of Montana.

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GEORGE F. HIGGINS,  
JAMES D. TAYLOR,  
Attorneys for Appellant





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IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

SAM CATRINO,

Appellant,

— vs. —

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

---

Upon Appeal from the District Court of the United States  
 for the District of Montana.

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JURISDICTIONAL STATEMENT

In this case the Appellant was charged in Count One of an Indictment filed in the District Court of the United States, District of Montana, Missoula Division, with Subornation of Perjury in violation of Section 232, Title 18, U.S.C.A., by unlawfully, corruptly and feloniously procuring one James B. Rennaker to commit perjury in a cause being tried in the District Court of the United States for the District of Montana, where the Appellant was then on

trial, and testify for the Appellant to certain false matters (Tr. 3).

The Appellant was charged in Count Two of the same Indictment with Obstruction of Justice, in violation of the provisions of Section 241, Title 18, U.S.C.A., by corruptly causing one James B. Rennaker, to attend the trial in the District Court of the United States for the District of Montana, where the Appellant was then on trial, and testify for the Appellant to certain false statements (Tr. 4).

The District Court had jurisdiction by virtue of the provisions of Section 41, Title 28, U.S.C.A., under which the District Courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States.

A judgment of conviction having been rendered in the District Court, an appeal was taken to this Court under the New Federal Rules of Criminal Procedure, which follows Section 687, Title 18, U.S.C.A., effective March 21, 1946.

This Court has jurisdiction of the appeal by virtue of the provisions of Section 225, Title 28, United States Code.

#### STATEMENT OF THE CASE

The Appellant, Sam Catrino, was charged by an Indictment in which there were three counts.

In Count One the Appellant and John A. Reinhard were charged with Subornation of Perjury, in violation of Section 232, Title 18, U.S.C.A. (Tr. 3).

In Count Two the Appellant and John A. Reinhard were charged with Obstruction of Justice, in violation of Section 241, Title 18, U.S.C.A. (Tr. 4)

In Count Three John A. Reinhard and Lester LaVal-

ley, charged as John Doe, were charged with attempting to influence a witness, in violation of Section 241, Title 18, U.S.C.A. (Tr.5). The Appellant, Sam Catrino, was not charged against in Count Three. (Tr. 5).

The Appellant moved to dismiss Count Two of the Indictment upon the ground that an offense against the laws of the United States was not charged (Tr. 6) but the motion was denied. (Tr. 7)

The Appellant made an objection to Count Number One and Count Two of the Indictment as being identical. (Tr. 8)

The Appellant, Sam Catrino, presented a Motion to the Court for a separate trial (Tr. 8) which was denied. (Tr. 9)

The Appellant moved to dismiss Count One or Count Two of the Indictment, or to direct the Government to elect between Count One and Count Two for the reason that there is duplicity in the charges set forth in Counts One and Two; that they are identical charges; and that the Appellant would be prejudiced by having both Counts submitted to a jury against him; that each Count required identical proof, neither requiring proof of any fact not required by the other (Tr. 13). The Motion was denied (Tr. 15).

The Appellant, Sam Catrino, moved to sever the Third Count from the Indictment for the reason that he was not charged as a Defendant in said Count and that it was prejudicial to him in his trial on Counts One and Two of the Indictment (Tr. 11), which Motion was denied Tr. 15).

The cause was tried before a jury and at the conclusion



of the Government's case a Motion was made for a judgment of acquittal upon Count Two of the Indictment (Tr. 138). The Motion addressed to Count Two of the Indictment was denied by the Court (Tr. 147).

The Appellant offered testimony in his own behalf and at the conclusion of the evidence renewed his motion for a judgment of acquittal on Count Two (Tr. 221). The Motion was by the Court denied (Tr. 221) and the case was submitted to the jury.

The jury returned a verdict of guilty as to the Appellant on Count Two and not guilty as to Count One. The defendant, John A. Reinhard was found not guilty on Counts One, Two, and Three (Tr. 15, 16); and the charge against Lester LaValley, charged as John Doe, under Count Three was dismissed by the Government (Tr. 136).

The Appellant was sentenced to serve eighteen (18) months and to pay a fine of \$350.00 (Tr. 17) from which judgment of conviction this Appeal is prosecuted (Tr. 18-19).

The Appellant contends that Count Two of the Indictment failed to charge an offense against the laws of the United States, and that the Motion to Dismiss the same should have been granted; that the Court erred in failing to grant the Appellants Motion for a Judgment of Acquittal on Count Two made at the close of the Government's case and renewed at the close of all the evidence; that the Court committed error in refusing to sever Count Three from the Indictment; that the Court erred in not dismissing from the Indictment either Count One or Count Two, or in not ordering the Government to elect as between Counts

One and Two upon the ground that the two Counts are identical, duplicitous, and the Appellant would be prejudiced by having both Counts submitted to the Jury; that the Court erred in the admission of testimony in the trial of said cause in support of Court Three of the Indictment, the Appellant, Sam Catrino, not being charged as a Defendant in said Count; that the Court erred in instructing the Jury that it could find the Appellant, Sam Catrino, guilty on Count Three of the Indictment; that the Court erred in failing to charge the Jury that there would have to be corroborating evidence under Count Two of the Indictment; that the Court erred in charging the Jury as to Count Three; that the Court erred in the admission of testimony in regard to separate and distinct offenses not charged in the Indictment; that the Court erred in not granting the Appellant a separate trial.

It is contended that these grounds, hereinafter separately set forth, require the reversal of the Judgment of Conviction in this case.

#### SPECIFICATIONS OF ERROR.

1. The Court erred in denying the motion for the dismissal of Count Two of the Indictment upon the ground that it fails to charge an offense against the laws of the United States (Tr. 7).

2. The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (Tr. 147).

3. The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (Tr. 221).

4. The Court erred in denying Defendant's Motion to sever Count Three from the Indictment (Tr. 15).

5. The Court erred in not ordering the dismissal of either Count One or Count Two of the Indictment, or in refusing to direct the Government to elect between Count One and Count Two (Tr. 8, 15).

6. The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant.

7. The Court erred in its oral charge to the jury that the jury could find the Defendant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) to which an exception was made before the jury retired, wherein it was stated "an exception is made to the Court's charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two" (Tr. 244).

8. The Court erred in failing to charge the jury that there would have to be corroborating evidence in support of the evidence of James B. Rennaker before a conviction could be had under Count Two of the Indictment; exception to the Court's oral charge upon this ground being

taken before the jury retired, as follows: "We except to that portion of the charge wherein the Court failed to charge the jury that there would have to be some corroborating evidence under Count Two, for it is our contention that said Count, in reality, states a charge of subornation of perjury, and the Count could not be proven or established without corroborating evidence to support the testimony of James Rennaker" (Tr. 243).

9. The Court erred in its oral charge to the jury that the testimony of one credible witness was sufficient to convict under Count Two of the Indictment (Tr. 233) to which an exception was taken before the jury retired (Tr. 243) as set forth in Specification of Error Number 8.

10. The Court erred in refusing to grant the Defendant a separate trial (Tr. 9).

11. The Court erred in the admission of testimony in regard to the attempted commission by the Appellant of subsequent, separate and distinct offenses not charged in the Indictment (Tr. 71-74). The substance of the testimony being that the Appellant contacted Mr. Rennaker subsequent to March 13, 1948, the date of the return of the Indictment, and that Rennaker testified that the Appellant had certain conversations with him wherein the Appellant was supposed to have attempted to secure Rennaker to testify that he, the Appellant, did not force Rennaker to lie on the witness stand and that he was supposed to have told Rennaker that he would put Rennaker back in business after the trial was over if he would testify that he didn't force him to lie on the witness stand . . . . to which objection was made as follows: "To which we object your Honor,

on the grounds that this is something separate and apart from what is set forth in the Indictment and apparently they are going to attempt to show a subsequent offense, something subsequent to that which is charged in the Indictment, and it isn't material to any of the issue here, as to whether Sam and John are guilty under Count One and Count Two, or whether Reinhard and LaValley are guilty under Count Three'' (Tr. 71-72).

The foregoing Specifications of Error were incorporated, in more succinct form, in the Statement of Points filed in the District Court (Tr. 22, 23, 24) and adopted in this Court (Tr. 268, 269).

## ARGUMENT

### *Specification of Error Number 1.*

“The Court erred in denying the motion for the dismissal of Count Two of the Indictment upon the ground that it fails to charge an offense against the laws of the United States (Tr. 7)”.

### *Specification of Error Number 5.*

“The Court erred in not ordering the dismissal of either Count One or Two of the Indictment or in refusing to direct the Government to elect between Count One and Count Two (Tr. 8, 15).”

The Indictment on which the Appellant was tried contained Three Counts:

The charging part of Count One is as follows: (Tr. 3).

“Sam Catrino and John A. Reinhard, solicited, procured and caused the said James Rennaker to appear as a witness in the said United States District Court on March 13, 1946, upon the trial of said cause and to be by the Clerk of the Court sworn as a witness in said cause and to testify that he, the said James B. Rennaker, on the late evening of October 20, 1945, was in



the said Brunswick Bar and there saw a Mexican person buy a quantity of wine at the bar of said saloon, and deliver the same to one Pat A. Pierre; that said testimony so given was false and known by the Defendants Sam Catrino and John A. Reinhard and by the said James B. Rennaker, to be false; that in truth and in fact, said James B. Rennaker was not in said place, nor in the City of Missoula at the time referred to, to wit, the late evening of October 20, 1945, but was in or near the City of Butte, Montana, and that in truth and in fact, he did not see any person sell any wine or other liquor to the Indian ward, Pat A. Pierre, on October 20, 1945."

The gist of Count One is that the Appellant procured one James Rennaker to testify falsely in a case which was tried in the United States District Court on March 13, 1946.

The charging part of Count Two is as follows: (Tr. 4).

"particularly in this, that said Defendants did corruptly cause one James B. Rennaker to attend said trial and be sworn and testify as a witness for the said Defendants to certain false statements, which said Rennaker and said Catrino and Reinhard knew to be false, to wit, testimony that said Rennaker was in the Brunswick Bar at Missoula, Montana, on the late evening of October 20, 1945, and there saw an un-named Mexican purchase a quantity of wine at the bar and deliver it to an Indian ward named Pat A. Pierre."

The gist of Count Two is that Appellant procured one James Rennaker to testify falsely in that same case, to the same facts set forth in Count One.

The Third Count was not directed against the Appellant Catrino, and he was not made a party to the crime alleged to have been committed.

The Jury acquitted Appellant of committing subornation of perjury as charged in Count One but convicted him

of the crime of subornation of perjury charged in Count Two.

It is Appellant's contention that subornation of perjury is not a crime contemplated under Section 241 making certain acts the crime of obstruction of justice.

In Section 241, Title 18, U.S.C.A., it is stated:

“Whoever corruptly, or by threats or force, or by any Threatening letter or communication, shall endeavor to influence, intimidate, or impede any party or witness, in any Court of the United States or before any United States Commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, or who shall injure any party or witness in his person or property on account of his attending or having attended such court or examination before such commissioner or officer, or on account of his testifying or having testified to any matter pending therein, or who shall injure any such grand or petit juror, in his person or property on account of any verdict, presentment, or indictment assented to by him, or on account of his being or having been such juror, or who shall injure any such commissioner or officer in his person or property on account of the performance of his official duties, or who corruptly or by threats or by force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. (As amended June 8, 1945, C. 178, Sec. 1, 59 Stat. 234.)

We assume that it is not necessary to submit authorities in support of our contention that subornation of per-

jury was a crime many years before the statute making certain acts the crime of obstruction of justice.

Section 231, Title 18, U.S.C.A., states as follows:

“Perjury. ‘Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than \$2,000 and imprisoned not more than five years. (R.S. Sec. 5392; Mar. 4, 1909, c. 321, Sec. 125, 35 Stat. 1111.)”

In Section 232, Title 18, U.S.C.A., it is provided:

“Subornation of perjury. Whoever shall procure another to commit perjury is guilty of subornation of perjury, and punishable as in Section 231 of this title prescribed. (R.S. Sec. 5393; Mar. 4, 1909, c. 321, Sec. 126, 35 Stat. 1111.)

Appellant contends that where a statute makes specific facts a crime and there is a general statute covering other matters which may include the crime fixed in the specific statute, that the specific statute will prevail—that is, if there is a statute such as Section 232, Title 18, U.S.C.A. making subornation of perjury a crime, it prevails over a general statute such as Section 241, which covers many matters and subornation of perjury could only be construed to be a crime under such section by judicial interpretation.

Appellant was not charged with having by force or threats attempted to impede, influence, or intimidate any person, Court, or officer, commissioner, or grand or petit juror but he is charged with having procured a witness to

give false testimony. In other words, in Count Two the Appellant was charged with the offense of subornation of perjury, designating the crime in said Count as obstruction of justice. Here we have a situation where the Appellant was directly charged in Count One with the crime of subornation of perjury, and was acquitted of that charge, and convicted by the jury on Count Two of having committed the same act of which he was charged in Count One and acquitted.

We may concede for the sake of argument that subornation of perjury was contemplated in Section 241 as one of the acts which constitutes obstruction of justice. However, we do not admit that obstruction of justice, as defined by Section 241, includes subornation of perjury, for the reason that subornation of perjury was made a crime and a punishment fixed prior to the enactment of Section 241, making obstruction of justice a crime. We further contend that the Government, having elected to try the Appellant upon a charge of subornation of perjury, that it is precluded from trying him in the same Indictment for the same crime by simply stating that this subornation of perjury constituted the crime of obstruction of justice. It seems absurd to seriously urge the contention that a crime other than subornation of perjury is charged in Count Two of the Indictment.

In 22 C.J.S. Section 9, Page 61, it is stated:

“A single act or transaction may not be split into two or more separate offenses,”

The testimony submitted on the part of the Government in the trial which resulted in the conviction of the



Appellant, Catrino, of the crime charged in Count Two, was the same testimony that was submitted by the Government in support of the allegations contained in Count One. There was no effort to present any facts, or present any testimony other than the testimony of the self-confessed perjurer, James B. Rennaker, that the appellant induced him to testify falsely in the case referred to in Count One and likewise in Count Two. It would seem that it is unnecessary to cite judicial determinations in support of this contention. The Appellant Catrino was charged in Count One with subornation of perjury. He was charged in Count Two with the obstruction of justice by that same charge of subornation of perjury. There is not a single allegation in Count Two other than the charge of subornation of perjury contained in Count One.

The details of the charge of subornation of perjury are not as fully set forth in Count Two as in Count One but it is attempted to be alleged in Count Two that the Appellant Catrino committed the crime of obstruction of justice by this very act of subornation of perjury contained in Count One, and the Government having elected to charge subornation of perjury in Count One, certainly is estopped from alleging that the Appellant was guilty of the obstruction of justice by this same alleged subornation of perjury.

If, as contended, that subornation of perjury is made a crime under two statutory provisions, the test seems to be that where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses is whether each requires proof of a fact which the other does not.



“Casebeer vs. United States 87 F. (2d) 668.”

Applying this test, which is apparently universal, can it be said that any testimony, in addition to the testimony required in the establishment of Count One was required in order to establish the charge in Count Two.

The charges are identical. This being true the Court should have ordered the Government to elect on which charge he should stand trial or should have dismissed either Count One or Count Two and it was prejudicial error not to have done so.

*Specification of Error Number 8.*

“The Court erred in failing to charge the jury that there would have to be corroborating evidence in support of the evidence of James B. Rennaker before a conviction could be had under Count Two of the Indictment; exception to the Court’s oral charge upon this ground being taken before the jury retired, as follows: “We except to that portion of the charge wherein the Court failed to charge the jury that there would have to be some corroborating evidence under Count Two, for it is our contention that said Count in reality states a charge of subornation of perjury, and the Count could not be proven or established without corroborating evidence to support the testimony of James Rennaker.” (Tr. 243).

*Specification of Error Number 9.*

“The Court erred in its oral charge to the jury that the testimony of one credible witness was sufficient to convict under Count Two of the Indictment (Tr. 233) to which an exception was taken before the jury retired (Tr. 243) as set forth in Specification of Error Number 8.”

*Specification of Error Number 2.*

“The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of

acquittal upon the Second Count of the Indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction. (Tr. 147)."

*Specification of Error Number 3.*

"The Court erred in denying the Motion of the Defendant for an order for the entry of a judgment of acquittal upon the Second Count of the Indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (Tr. 221)."

Exception was taken to the Court's oral charge to the jury, on the ground that the Court failed to charge that some corroborating evidence was necessary under Count Two, it being our contention that the Count states a charge of subornation of perjury, and it could not be established without corroborating evidence to support the testimony of James Rennaker. (Tr. 243). As to Specification of Error Number 8 an exception was taken before the jury retired. (Tr. 243.). The same exception as was taken to Specification of Error Number 8 was taken as to Specification of Error Number 9 (Tr. 243).

On any theory, James Rennaker and the Appellant were accomplices in committing the alleged crime charged in Count Two of the Indictment. Appellant Catrino was convicted on the uncorroborated testimony of the accomplice, James Rennaker. James Rennaker was a self-confessed perjurer. If, as the Court instructed the jury, some corroboration is necessary to support a judgment of conviction of the charge of subornation of perjury, certainly it would be a fiction to say that corroborating evidence is not required to convict Appellant on the charge of the obstruc-

tion of justice, where the alleged acts constituting the crime of obstruction of justice, is the crime of subornation of perjury.

The Court instructed the jury that in so far as the charge in Count Two is concerned, a conviction could be had on the testimony of one credible witness (Tr. 233). The record may be searched from cover to cover and corroborating evidence or facts can not be discovered which in any manner corroborate the testimony of the witness Rennaker. Appellant took exception to the oral charge to the jury that the Appellant Catrino could be convicted under Count Two without any corroboration of the witness Rennaker (Tr. 243).

It is not contended that there was no corroborating testimony to disclose that Rennaker had previously perjured himself, but in Count Two Rennaker and Appellant were accomplices, and the Court should, of its own motion, have instructed the jury that the Appellant could not be convicted on the testimony of Rennaker without some corroboration, at least to have instructed the jury that Rennaker's testimony should be received with great caution.

If it is contended that the acts of these two men committed the crime of obstruction of justice, they are accomplices, and if they are accomplices, it is universally held that you can not convict on the uncorroborated testimony of an accomplice and the Court should have so instructed the jury, even though a request to that effect was not made.

"In a criminal case the Court must instruct on all essential questions of law, whether requested or not.

Morris v. United States (C.C.A. 9) 156 F. (2) 525

Miller v. United States (C.C.A. 10) 120 F. (2d) 968

Anderson v. United States (C.C.A. 9) 157 F. (2d) 429.

However, Appellant offered an instruction, which was refused by the Court as effecting the other Defendant, John Reinhard, but a similar instruction should have been given as to Appellant Catrino (Tr. 255).

It is to be observed that the Court instructed the jury that it was not necessary that the testimony of this self-confessed perjurer, Rennaker, be corroborated in order to establish the charge in Count Two (Tr. 233).

Appellant offered an Instruction which was refused embodying the principle that there must be some corroborating circumstances, at least, to establish the charge set forth in Count Two (Tr. 260).

The Appellant, Catrino, at the conclusion of the Government's case and again when all the evidence was in moved for the entry of a judgment of acquittal. Both Motions were over-ruled.

Appellant was convicted on the Second Count of the Indictment on the testimony of Rennaker. There was no testimony submitted to corroborate him.

In this Count, the charge being obstruction of justice, committed by Appellant's procuring Rennaker to commit perjury, the two offenders were accomplices and neither could be convicted of any crime unless his testimony was corroborated. Rennaker admits that he committed perjury and, in the absence of any testimony to corroborate Rennaker's testimony, the Appellant, Catrino, stands convicted on the testimony of a self-confessed perjurer. The testimony of a credible witness of which the Court speaks in its instructions to the jury, as being sufficient to establish

the crime charged in Count Two was missing, unless we assume a perjurer qualifies for that class. We contend that a credible witness does not include a witness who confesses he is a perjurer and, this being true, the Court was in error in not granting our motion for an order for the entry of a judgment of acquittal at the conclusion of the Government's case or when all the evidence was in.

Assumnig, for the sake of argument, that Rennaker was not an accomplice with Catrino, we are still in the same position; the Appellant, Catrino, was convicted on the testimony of a confessed perjurer.

In the case of *People v. Evans*, 40 New York, Page 1, one of the very leading cases on this subject, the Court said:

“Now, what is involved in such a verdict? The jury must, by their verdict, convict Near of perjury, for this is the very question to be tried; and after they have done that, to place their verdict of the defendant's guilt, in suborning him, upon the sole uncorroborated evidence of this perjured witness, who, for the paltry sum of \$25, would swear to an alibi to save a guilty burglar and thief from the just punishment due to his crimes.” . . . . .

“This rule can hardly exist in every case, consistent with another rule of evidence, which has become a maxim of the law of evidence. It is a rule for the control and guidance of the jury, and which is, that if the jury find the witness has sworn corruptly false in one material thing, they shall pronounce him false in his whole testimony, and utterly disregard it. The maxim of the law in this respect is, “*falsus in uno; falsus in omnibus*,” false in one thing, false in all things.” . . . . .

“Now, how does this principle apply to the case at



bar? The jury must find, from Near's own testimony, before they can convict the defendant, that he, Near, has corruptly committed perjury. Applying the principle that if the testimony of the witness be corruptly false in one thing, the whole must be rejected. I do not see how the charge in this case can be sustained." . . .  
 . . . .

"No jury should ever have the opportunity given them by any court to render so disgraceful a verdict, in a court of justice, as this. The jury are required literally to stultify themselves."

The language of this case was cited with approval in *Hammer v. United States*, 271 US 620, 70 L ed 1118, 46 S Ct 603;

See also 41 Am. Jur. Section 78, Page 43.

*Specification of Error Number 4.*

"The Court erred in denying Defendant's Motion to sever Count Three from the Indictment (Tr. 15).

*Specification of Error Number 6.*

"The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant.

*Specification of Error Number 7.*

"The Court erred in its oral charge to the jury that the jury could find the Defendant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) to which an exception was made before the jury retired, wherein it was stated "An exception is made to the Court's charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two.' (Tr. 244)"

*Specification of Error Number 10.*

“The Court erred in refusing to grant the Defendant a separate trial (Tr. 9)”

Count Three charges that John A. Reinhard and John Doe, whose true name is unknown did, on or about October 20, 1945, unlawfully, corruptly and feloniously endeavor to influence one Pat Pierre, a witness in a cause entitled United States of America vs. Sam Catrino and John Reinhard, then pending in the United States' District Court for the District of Montana, in which the said Reinhard and Catrino were charged with unlawfully selling a quantity of wine to Pat Pierre, an Indian Ward, in that they corruptly offered Pat Pierre a sum of money as a bribe to procure him to testify that a bottle of wine which was in fact sold to him by the Defendant, John Reinhard, was sold to him by an unknown Mexican and that they stated to said Pierre that they would back him up in said false testimony.

Appellant, Sam Catrino was not charged with having committed the offense alleged in Count Three, nor was it charged that he conspired with Reinhard and this unknown person to make any attempt to procure this man, Pat Pierre, to testify or refuse to testify in the case. Pat Pierre was the person to whom it was alleged in Count One and likewise in Count Two, wine was sold by the Defendant Reinhard while in the employ of the Appellant, Catrino.

The testimony submitted in support of Count Three was necessarily highly prejudicial to the Appellant, Catrino. It is difficult to determine what effect this testimony had with the jury sitting in the trial of the cause and

which rendered its verdict convicting the Appellant of the charge contained in Count Two.

It would seem that a fair trial accorded any person should not permit any information to be considered by a jury which might in any manner influence a jury or prejudice a jury against a person charged with crime and unless the testimony is directed to the charge on which he is standing trial it should not be permitted to be considered by a jury.

Admitting such testimony deprived the Appellant of a fair trial.

Rule 8 of the new Federal Rules of Criminal procedure, following Section 687, Title 18, U.S.C.A. Page 230, provides:

“Rule 8. Joinder of offenses and of Defendants:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same Indictment or Information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such Defendants may be charged in one or more counts together or separately and all of the Defendants need not be charged in each count.”

Under the above rule the joinder of these offenses and of these Defendants into one Indictment was improper.

The Appellant was charged under Count One and

Count Two (Tr. 3, 4) with committing the offense therein charged, on or about March 13, 1946. Count Three of the Indictment charges the Defendants Reinhard and Lester LaValley with committing the offense therein charged on or about October 20, 1945. The Third Count in the Indictment is a separate and distinct transaction from the one set forth in Count One and Count Two.

There are two separate and distinct transactions set forth as between Count One and Count Two and the third Count and the rights of the Appellant were substantially prejudiced, occasioned by the joinder of the offenses and Defendants in Count Three of the Indictment. In this connection see

United States v. Cataneo—167 F. (2d) 820.

The question therein involved was a joinder of Indictments. However, there is a very able discussion of the application of Rule 8 (*supra*). In that case it was stated:

“Rule 8 (b) permits the joinder of two or more defendants in the same indictment “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.”

We submit that the Motion to Sever Count Three from the Indictment should have been granted.

The Court erred in admitting testimony in support of Count Three of the Indictment wherein the Appellant was not charged as a Defendant for the reason that the very nature of the testimony was prejudicial to the Appellant in having a fair trial under Count One and Count Two of the Indictment for the reason that under that charge the Government attempted to show that John A. Reinhard and

Lester LaValley had unlawfully, corruptly and feloniously endeavored to influence one Pat A. Pierre, a witness in the cause entitled United States of America vs. Sam Catrino and John Reinhard in that they offered said Pat A. Pierre a sum of money as a bribe to procure him to testify that a bottle of wine which was alleged to have been sold to said Pierre by said Defendant John A. Reinhard was sold to said Pierre by a Mexican, and stated to said Pierre that they would back him up in said false testimony (Tr. 115-120).

That the admission of such testimony under Count Three was highly prejudicial to the Appellant, Sam Catrino, and prevented him from having a fair trial under Count Two of the Indictment, under which he was convicted and permitted the jury to arrive at their verdict by compromise and in the consideration of evidence that did not apply to the Appellant.

The Court instructed the jury that they could find the Appellant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) even though he was not charged as a Defendant under said Count, to which oral charge to the jury the Defendant excepted (Specification of Error Number 7, above).

All of the above errors readily brings one to the conclusion that the Appellant was greatly prejudiced in having a fair trial under the two Counts in which he was charged as a Defendant, which errors clearly point out the reason the Court erred in refusing to grant the Appellant's Motion for a Separate trial. (Tr. 9).



*Specification of Error Number 11.*

“The Court erred in the admission of testimony in regard to the attempted commission by the Appellant of subsequent, separate and distinct offenses not charged in the Indictment (Tr. 71-74). The substance of the testimony being that the Appellant contacted Mr. Rennaker subsequent to March 13, 1948, the date of the return of the Indictment, and that Rennaker testified that the Appellant had certain conversations with him wherein the Appellant was supposed to have attempted to secure Rennaker to testify that he, the Appellant, did not force Rennaker to lie on the witness stand and that he was supposed to have told Rennaker that he would put Rennaker back in business after the trial was over if he would testify that he didn't force him to lie on the witness stand . . . . to which objection was made as follows: ‘To which we object your Honor, on the grounds that this is something separate and apart from what is set forth in the Indictment and apparently they are going to attempt to show a subsequent offense, something subsequent to that which is charged in the Indictment, and it isn't material to any of the issues here, as to whether Sam and John are guilty under Count One and Count Two, or whether Reinhard and LaValley are guilty under Count Three.’ (Tr. 71-72)”

The testimony of the witness, Rennaker, relates to an alleged attempt on the part of the Appellant to influence the testimony of the witness, Rennaker, which evidence was in regard to a separate, distinct and subsequent offense, of which the Appellant was not charged in the Indictment.

Count One and Count Two of the Indictment in which the Appellant was charged alleges that the offense was committed on or about March 13, 1946. In introducing the evidence herein outlined, the Government sought to prove that the Appellant attempted to commit a subsequent,

separate and distinct offense, subsequent to the 13th of March, 1948.

Over objection the witness was permitted to give this testimony. (Tr. 72).

We submit that this testimony was not admissible upon the question of intent as indicated by the Court (Tr. 72), that evidence of another offense, to be admissible, must show *prima facie* the commission of a complete offense.

In 20 Am. Jur. Sec. 309, at Page 287, it is stated:

“A person, when placed upon trial for the commission of an offense against the criminal laws, is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the indictment against him. It is a well established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless the other offenses are connected with the offense for which he is on trial.”

In 20 Am. Jur. Sec. 317, at Page 298, the rule is stated:

“317. PROOF OF SUBSEQUENT OFFENSES. There is a difference of opinion as to whether proof of offenses committed after the commission of the particular offense with which the accused is charged is ever admissible in evidence against him in the prosecution of the first offense. According to one line of authorities, evidence of offenses committed subsequent to the act charged is never admissible in evidence. Other authorities favor the admissibility of such proof in certain instances, as in the cases of offenses arising out of sexual intercourse, upon the theory that subsequent acts disclose the disposition of the parties.”

We submit that the evidence as to these alleged con-

versations between Remaker and Catrino was not admissible in this case and that this evidence was highly prejudicial to the Appellant.

### CONCLUSION

It is respectfully submitted that the judgment of conviction should be reversed for the reasons hereinbefore stated.

Respectfully submitted,

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**United States  
Court of Appeals  
For the Ninth Circuit**

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SAM CATRINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Brief of Appellee**

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**PAUL C. O'BRIEN**

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United States  
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For the Ninth Circuit

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SAM CATRINO,

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**BRIEF OF APPELLEE**

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**STATEMENT OF FACTS**

Appellant's statement of the case is wholly inadequate. The history of it is this:

The instant prosecution arose out of an abortive attempt by the appellant, Sam Catrino, to escape conviction on a charge of violating the Indian Liquor Law. Therefore, the history of that charge is essential to an understanding of the charge of obstructing justice and subornation of perjury which resulted in this appeal.

Sam Catrino at all times was the proprietor of the Brunswick Bar in Missoula, Montana, and one John Reinhard was his bartender. Both were prosecuted for selling liquor to an Indian ward named Pat A. Pierre on a day certain, viz., October 20,

1945, at some time not long after 10:00 P. M. of that day. The government proved that the Indian, Pierre, went into the saloon and up to the bar, behind which were Catrino, the proprietor, and Reinhard, the bartender; and that Reinhard in the presence and hearing of Catrino sold a bottle of intoxicating liquor to Pierre. The defense was that not Pierre but some unnamed Mexican went to the bar and bought the liquor, then delivered it to Pierre. In support of this defense one James B. Rennaker was called as a witness and testified that he saw the Indian come in, that the Indian first tried to get him, Rennaker, to buy the liquor for him, and upon the witness' refusal, the Indian then went to the Mexican and got the Mexican to "make the buy." The defense failed of effect, and the jury convicted both Catrino and Reinhard, and the judgment of conviction became final. (R. 40, 41, 42.) (Thereby arose an adjudication as between the government and Catrino, hereinafter discussed.)

At this point begins the instant case. Separate indictments were returned, one against Rennaker for perjury, the other against Catrino and others. Catrino was charged in Count One with subornation of the Rennaker testimony, and in Count Two with a violation of Sec. 241 Title 18 U. S. Code in that the defendants, Catrino and Reinhard, did un-

lawfully, corruptly and feloniously influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, predicated the allegations of Count Two on the Rennaker incident and arising out of the same case referred to in Count One, and referring specifically to the charge made by the government against Sam Catrino and John A. Reinhard for a violation of Sec. 241 Title 25 U. S. Code, an unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian ward of the United States.

In Count Three of the indictment the appellant herein, Sam Catrino, is not charged with any offense, but his co-defendant in Counts One and Two, John A. Reinhard, is charged with one John Doe (identified as Lester LaValley) with a violation of Sec. 241 Title 18 U. S. Code, and the allegations set forth and refer to the case of the United States of America vs. Sam Catrino and John A. Reinhard as well as the fact that the charge arose out of the same unlawful sale of wine to Pat A. Pierre, an Indian ward of the United States. Accordingly all three counts of the indictment are based on the same transaction.

Rennaker pleaded guilty and became a witness for the government against Catrino and his co-

defendants. The verdict here appealed from found Catrino guilty of obstruction of justice (Count Two above). Analysis of the Rennaker testimony follows.

In the Indian Liquor case Rennaker had testified that he was in Missoula on the evening of October 20, 1945, having made a short trip with his cattle truck to Post Creek, Montana, that day, a distance of only 53 miles. In fact, as he testified in the instant case, he was not at Post Creek at all, but was delivering a load of cattle to Butte, Montana, a distance of 120 miles from Missoula, Montana, and at the time of the transaction in the Catrino saloon was, of necessity, more than 100 miles away, and so could have known nothing about the liquor sale. Rennaker was a trucker by occupation, with a second-grade education. (R. 71.) Titles to his trucks were held by Catrino, and Catrino used this leverage to exert compulsion on Rennaker to testify in the first case. (R. 48; 66-69.) He also fed him four or five shots of whiskey on the day of the trial to "fortify" him for the job of perjury. (R. 70.)

In view of the full and fair charge to the jury on the subject of corroboration of Rennaker, it becomes important to enumerate the corroborating witnesses and their testimony:



1. Of outstanding importance is the adjudication worked by the verdict in the liquor case, resulting in the finding of every issue in favor of the government and against Catrino, including the truth or falsity of Rennaker's testimony in that case. See Court's charge. (R. 234-236.)

2. In effect, and of necessity, the Indian liquor case was tried over again. Pierre again testified that he bought the liquor over the bar. (R. 116.)

3. The witness Greenfield, a Police Officer in the City of Missoula on October 20, 1945, witnessed the violation of the Indian Liquor Law by Reinhard and Catrino and specifically stated that he knew Rennaker and that Rennaker was not in the Brunswick Bar at that time. (R. 107-110.)

4. John I. Romer, a stockman of Post Creek, Montana, who had been named as the consignee of cattle by the original testimony of Rennaker, testified that Rennaker did not deliver any cattle to him on October 20, 1945, again supporting Rennaker's statement in the instant case. (R. 103.)

5. Rennaker's wife (R. 42-43.) who kept the books of his trucking business and produced them in court, (Plaintiff's Exhibit 2-A, R. 47-48.) testified that on October 20, 1945, he hauled 25 head of cattle to Butte, Montana, for a man named Davis. She further testified that she accompanied her hus-

band on the trip to Butte, Montana, where they arrived at about midnight. (R. 44-45.)

6. Leonard Lytle, a Brand Inspector employed by the State of Montana, (R. 104.) produced a record of brand inspections of 25 head of cattle for Parke Davis, Butte, Montana, on October 20, 1945. Since the hauling of cattle to Butte and not to Post Creek was the vital test of whether Rennaker's testimony was false in the liquor case and true in the instant case, it is obvious that it was overwhelmingly shown that his latter testimony was true, even regardless of the adjudication.

7. Not only to corroborate Rennaker, but to establish the procurement of his false testimony by Catrino, it was established by Mrs. Rennaker that Catrino held the title to Rennaker's trucks up to and including March 13, 1946, the date of trial of the liquor case. (R. 48.)

8. Rennaker's own testimony is as follows:

“Q. Who told you about the case, if you remember?

A. Sam did.

Q. Sam Catrino?

A. Yes.

Q. Was any suggestion made or request made of you at the time when Sam talked to you about the case?

A. He said I would be a good witness, make a good witness for him.

Q. For him?

A. Yes.

Q. Did you reply to his statement?

A. I had to.

Q. What was that?

A. I had to.

Q. Why did you have to?

A. He was financing me on trucks and I had to listen to him.

Q. Did Mr. Catrino tell you you had to listen to him?

A. He told me—he didn't say I had to, but he said, "You have got to testify for me."

Q. He said, "You have got to testify for me?"

A. Yes.

Q. Did he tell you how you were to testify?

A. He did.

Q. What is the story he told you you must testify to?

A. Well, he told me to get on the stand and say that an Indian asked me to buy him a quart of wine and I refused him, and the Indian went over and asked a Mexican to buy him a quart of wine and the Mexican bought him a quart of wine and handed it to the Indian and he went out.

Q. Now, did Mr. Catrino tell you that just once?

A. He told me several times." (R. 66-67.)

\* \* \*

"Q. Let us come down to a point near the trial, which as the record shows was held here on March 13, 1946. Now, shortly before the trial, did you have a conversation with either Sam Catrino or John Reinhard as to how you were to testify?

A. Well, Sam - - Sam told me the first time what to testify to and then John, he come along and he says, 'Will you be a witness for us,

Jim?', and I says, 'Of course, I will.'

Q. John Reinhard you mean said that?

A. Yes. He asked me if I would be a witness. He didn't know if I knowed something about it, but Sam says, 'He will be a witness for us.'

Q. When was that, now? How long before the trial did that conversation take place, do you remember?

A. It was right after they was arrested.

Q. Shortly after they were arrested. What else was said at that time?

A. Well, I told him I didn't know. I told Sam I didn't know whether I could remember that or not and he says, 'I'll jog your memory so you will know.'

Q. Was your memory jogged?

A. Several times.

Q. How many times?

A. I couldn't say how many, but six or eight, anyway." (R. 68-69.)

\* \* \*

"Q. You stated there was a conversation held between the three of you on the morning of the trial in the Brunswick Bar. Do you recall what was said at that conversation?

A. Well, I told Sam I didn't like to do that, and he said, 'I'll give you a few shots of whisky,' and he says, 'You will be all right.'

Q. Did he give you a few shots of whisky?

A. He did.

Q. Do you recall how many?

A. Four or five.

Q. Did you go over or review the story you were to tell when you got on the witness stand at that time?

A. Yes.

Q. You reviewed that story with Mr. Catrino and Mr. Reinhard, did you, that morning?

A. That's right.

Q. Did you go into specific dates and where you were to be in the Brunswick Bar that evening?

A. That's right.

Q. You stated a little while ago you had not seen Pat Pierre before you came into the courtroom that day. What were you told about that?

A. They told me, Sam says, 'Do you know Pat Pierre?' and I says, 'No,' and he says, 'You can tell them you did anyway.' " (R. 70-71.)

9. Rennaker was attacked by the defense on the claim that he had been trying to 'shake down' Catrino because the latter had finally taken his trucks away from him and destroyed his trucking business. The alleged shake-down was necessarily an alleged report to the FBI Special Agent. However, witness George Rhoades, Special Agent of the Federal Bureau of Investigation in charge of the investigation, testified that Rennaker never came to him or volunteered any information against Catrino, but that Rhoades went to Rennaker's place and interviewed him. (It is, in addition, somewhat absurd that a man would, for a mere money grudge, inform against another under circumstances such that the informer would himself disclose his own perjury, and be convicted of it, as Rennaker was.)

### **SUFFICIENCY OF THE INDICTMENT**

Appellant in his first specification of error con-



tends that Count Two of the indictment does not charge an offense against the laws of the United States. In his argument the appellant does not argue or cite any authority to sustain the contention nor do we think that he could do so. The appellant contends that Count Two charges subornation of perjury and is the same charge as that contained in Count One. Count One charges in part:

“The above named defendants, Sam Catrino, and John A. Reinhard, on or about March 13, 1946, at Missoula, in the District of Montana, and within the jurisdiction of this court, did unlawfully, corruptly and feloniously, procure one James B. Rennaker, to commit perjury as follows: \* \* \*” (R. 3.)

While Count Two charges in part that the defendants:

“\* \* \* did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, then in session and engaged in the trial of a cause entitled, ‘United States of America vs. Sam Catrino and John A. Reinhard,’ wherein said Defendants were charged with and being tried for a violation of section 241 of Title 25 of the United States Code, to-wit: \* \* \*” (R. 4.)

Obviously the charge in the two counts is not the same. Judge Pray consistently overruled the contention of appellants that Count Two charged subornation of perjury, and in reply to the argu-

ment made on the point at the close of the Government's case said:

"Court: Oh, no, that is based on a definite statute. That is the reason why I overruled your motion. There is a definite statute, a separate and distinct offense." (R. 144.)

Count Two does charge a public offense.

Walker v. United States, 93 F. (2d) 792

United States v. Perlstein, 126 F. (2d) 789

United States v. Polakoff, 112 F. (2d) 888

Nye v. United States, 137 F. (2d) 73

United States v. Bickford, 168 F. (2d) 26

McCoy v. United States, decision August 24, 1948, (not yet reported.)

Judge Pray properly held that Count One and Count Two charged separate offenses. As stated by the Circuit Court of Appeals, Tenth Circuit, in Slade v. United States, 85 F. (2d) 786 at 790:

"While counts seven and eight were predicated on the same transaction, they charged separate and distinct offenses in law, defined in separate provisions of section 135, supra. The first charged an endeavor to accomplish the evil purpose and falls in class one. The second charged the accomplishment of a different evil purpose and falls in class three."

\* \* \*

"Two offenses may be distinct in point of law even though they grow out of the same transaction, if one embraces a different element than the other.

A single act may be an offense against two

statutes, and if the offense defined in one embraces an element not included in the other, an acquittal or conviction under one does not exempt the defendant from prosecution and punishment under the other.

Congress may make each separate step in a transaction a distinct offense."

In that case both charges were defined in the same statute. In the case cited by appellants, *Casebeer v. United States*, 87 F. (2d) 668, the court said in part:

"Congress may make each separate step in a transaction a distinct offense." (Cases cited.)

And in *Hunt v. Hudspeth*, 111 F. (2d) 42, the court said in part:

"Congress may make separate steps in a single transaction distinct and separate offenses. *Burton v. United States*, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Casebeer v. United States*, 10 Cir., 87 F. 2d 668; *Slade v. United States*, 10 Cir., 85 F. 2d 786.

The test as to whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge. If not, then the fact that both charges relate to and grow out of one transaction does not make only a single offense where two distinct offenses are defined by the statute. *Gavieres v. United States*, 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489; *Poffenbarger v. United States*, 8 Cir., 20 F. 2d 42."

In the present case we have two different statutory provisions. The element of corroboration is

of itself enough to differentiate the two. Further, to sustain a conviction on Count One it would be necessary to prove the actual subornation while Count Two would be sustained if proof was made of an endeavor to either influence, obstruct or impede justice. On this latter point the Circuit Court of Appeals for the Eighth Circuit discussed the question at length in *Bedell v. United States*, 78 F. (2d) 358.

**APPELLANT'S CONTENTION THAT THE COURT CHARGED THE JURY IT COULD FIND CATRINO GUILTY ON COUNT THREE.**

The appellant's specification of error Number 7 states that the Court charged the jury that it could find the defendant Sam Catrino guilty under Count Three of the Indictment. Catrino was not charged in Count Three. In his brief the appellant states:

"The Court instructed the jury that they could find the Appellant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) even though he was not charged as a Defendant under said Count, to which oral charge to the jury the Defendant excepted (Specification of Error Number 7, above)." (Appellant's Brief 23.)

Appellant did not except to any such charge made to the jury. The exception quoted in Specification of Error Number 7 is:

“ ‘an exception is made to the Court’s charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two’ (Tr. 244).” (Appellant’s Brief 6.)

Judge Pray in his charge to the jury read Count Three and in so doing called attention of the jury to the fact that only John A. Reinhard was a defendant as the charge had been dismissed as to LaValley. (R. 227-228.) Then Judge Pray said:

“That count, as you will recall, now stands only against the defendant John A. Reinhard.” (R. 228.)

Again in his charge Judge Pray said:

“Count 3 of the Indictment does not concern defendant Catrino, but does concern defendant Reinhard.” (R. 236.)

The attempt to mislead this Court is obvious.

### **THE COURT PROPERLY DENIED MOTIONS AS TO COUNT THREE**

Appellant specifies error in the Court’s refusal to grant the motions to sever Count Three from the Indictment (Specification of Error Number 4) and in refusing to grant to appellant a separate trial (Specification of Error Number 10).

We have heretofore, in our statement of facts, called attention to the basis for this Indictment.



Appellant in his brief quotes from Rule 8 of the Federal Rules of Criminal Procedure. It would seem that the argument made answers itself. All three of the counts in the Indictment are based on the Indian Liquor case and attempts made to defeat or prevent justice being done in that case.

The evidence as to Count Three could not possibly have prejudiced appellant—his brief to the contrary is not supported by law or fact. The Court fully and fairly charged the jury as to Count Three. The jury did find Reinhard, the defendant in that count, not guilty. (R. 15.)

### **THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT**

The position adopted by appellant in this case seems to be that the Court should have granted the motion for the entry of a judgment of acquittal as to the defendant Catrino. The appellant adopts the position that in order to be convicted on Count Two the government was required to prove that the corruption of justice was successful. We submit that if an endeavor to influence, obstruct or impede the due administration of justice was proven, that would be sufficient. In the case of *Bedell v. United States*, 78 F (2d) 358, the Court was concerned with an endeavor to corrupt jurors and we believe the statement of the Court in that case is

just as applicable in this case, where we are concerned with a witness. The Court at page 365 said:

“This statute not only condemns influencing, obstructing, and impeding the due administration of justice, or endeavoring so to do, but it also condemns endeavoring to influence, intimidate, or impede a juror. Count 3 of the indictment charges that the defendants endeavored to influence and impede the juror Gander in the discharge of his duties as a juror. In *United States v. Russell*, 255 U. S. 138, 41 S. Ct. 260, 261, 65 L. Ed. 553, the Supreme Court, in considering this section, said:

‘The section, however, is not directed at success in corrupting a juror, but at the “‘endeavor”’ to do so. Experimental approaches to the corruption of a juror are the “‘endeavor”’ of the section. Guilt is incurred by the trial—success may aggravate; it is not a condition of it.’

Again, the court said:

‘The word of the section is “‘endeavor”’, and by using it the section got rid of the technicalities which might be urged as besetting the word “‘attempt”’, and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent.’

It is observed that the success of the endeavor aggravates the offense, and hence it could not well destroy it. The lower court instructed that whether the offense was successful and completed was not a condition to successful prosecution, and this instruction was not excepted to.”

We call the court’s attention to Judge Pray’s comment on the motion made at the close of the government case to point out the effect of the ver-

dict in the Indian Liquor case, out of which this Indictment arose. Judge Pray in that comment very well points out the corroboration apparent from the record in this case. He stated:

“Court: Well, of course, so far as the perjury, there must be proof of the fact that perjury was actually committed. Now, the judgment roll has been introduced here, and it is found that there was a charge there of selling liquor to an Indian ward of the Government of the United States, and the defendants plead not guilty. That brings to issue, of course, all the material allegations of the information. It was tried and against these two defendants. The jury found, of course, that the defendants were guilty. Now, included in that verdict would also be an adjudication that the defense was false and they didn't believe it, and that the testimony of Rennaker as to how the transaction occurred, and that a Mexican purchased the wine in question and afterwards gave it to Pierre, was false. It seems to me that that is *res adjudicata*. It is a thing adjudicated and it stands and there can be no further question raised as to the fact of the commission, or as to the guilt of the defendants and the commission of perjury there by reason of the verdict of the jury that they didn't believe the defense that was offered and that it was untrue. Otherwise, they would have been obliged to find for the defendants.” (R. 144-145.)

\* \* \*

“Now, if the defendants, one or both of them—they were tried together. There was a defense. They must have procured and presented it. They presented this man Rennaker, who said that the sale of the wine was made to a

Mexican and not to the Indian ward of the government. The verdict of the judgment was that that was not true. But I think the authorities will hold that it is adjudicated, res adjudicata of the facts that were presented there. Now, **it seems to me that there is corroboration there in that very adjudication of the testimony of Rennaker.** Then, too, the facts presented here show where he was, what he was doing, and the defendants must have known, of course, he wasn't there at all and couldn't have been there because the evidence here conclusively shows that he hauled a load of cattle to Butte that night. He didn't come back, or start back, until sometime early in the morning of the 21st of October, 1945. All the circumstances and associations, transactions, business transaction, between Rennaker and the defendants, especially the defendant Catrino, shows a close connection, and if they didn't procure the testimony, who did? How did it happen? It was there and in their presence." (R. 146-147.) (Emphasis ours.)

The doctrine of res judicata, supported by authority produced below, operated to the effect that, as between Sam Catrino and the United States, the falsity of Rennaker's testimony given on the trial of the liquor case was finally adjudged—and of course also that every other material fact in issue between the government and Catrino was similarly adjudged in favor of the government.

Because of the nature of criminal cases, res judicata has been less frequently applied than in civil causes. However, the law is all one way.

In *State v. Hopkins*, 68 Montana 504, 219 Pac. 1106, a judgment of acquittal was worked by *res judicata*, because the accused had won a verdict of acquittal in a companion case in which the pertinent transaction was proven on the theory of “system.” In this case a careful collection is made of previous decisions and authorities:

*People v. Frank*, 28 Cal. 507

*Bell v. State*, 57 Md. 108

*Mitchell v. State*, 140 Ala. 118,

37 So. 76, 103 A. S. R. 17

*Commonwealth v. Evans*, 101 Mass. 25.

The opinion in the *Hopkins* case remarks, “The dearth of authority upon the subject seems almost inexplicable,” but goes on to show that it is all one way. In addition to the decisions cited, the following authors appear:

Freeman, *Judgments*, sec. 318:

“The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases.”

2 Van Fleet, *Former Adjudication*, sec. 628:

“If there is a contest between the state and the defendant in a criminal case, over an issue, I know of no reason why it is not *res judicata* in another criminal case.”

So it results from the verdict and judgment in the *Catrino* liquor case that *Catrino's* defense was false, and the material facts testified to by the witnesses called by him for that purpose were non-



existent and perjured. Therefore, while the government assumed the burden of corroborating Rennaker's testimony, it discharged that burden by introducing in evidence the judgment roll and transcript of testimony in the liquor case of United States v. Catrino. (R. 40-42 and R. 38, plaintiff's Exhibit No. 1.)

There was, as we have heretofore pointed out in the statement of facts, ample and voluminous corroboration of the witness Rennaker, a man whose education extended only to the second grade. (R. 71.)

Appellant complains of the evidence admitted by the court to show that appellant's attempts or endeavors to influence the witness Rennaker continued after the indictment in this case had been returned. (Specification of Error No. 11.) The witness Rennaker did testify that he was contacted a number of times by appellant after this case had been presented to a Grand Jury sitting in Great Falls, Montana. (R. 72.) In particular Rennaker testified as follows:

“Q. Have you been contacted by either Sam Catrino or John Reinhard since this indictment was returned by the Grand Jury sitting in Great Falls last spring?

A. With Sam, yes.

Q. By Sam?

A. Yes.

Q. Sam Catrino you mean? Have you had any conversation with Sam Catrino as to how you would testify in this trial?

A. I did.

Q. What was your conversation—strike that. Do you recall when you had a conversation or conversations with Sam Catrino regarding that matter?

A. I had a lot of conversations with him since I come back from Great Falls.

Q. That is, when you say, “come back from Great Falls,” you refer to your appearance before the Grand Jury sitting in Great Falls last March?

A. That’s right.

Q. You have had a number of conversations with him since that?

A. After that.

Q. Did these refer to how you were to testify in this case?

A. That is what he told me.

Q. What was that?

A. He was trying to get me to testify that he didn’t make—force me to lie on the witness stand. He wanted me to get up here and tell the jury he didn’t force me to lie on the witness stand.”

\* \* \*

A. He told me he would put me back in business after the trial was over if I would testify like that.

Q. Can you tell the Court and jury just what he wanted you to testify to in this trial, just what Mr. Catrino wanted you to testify to in this trial?

A. He wanted—I told you what he wanted me to testify.

Q. Tell me again, possibly I didn’t get it all.

A. He wanted me to testify on the witness stand here that he didn't force me to lie on the witness stand.

Q. Anything else?

A. I don't remember now, no. He said for me to go up there and tell on the witness stand that he did not force me to lie and if I would do that, after the trial was over with, he would put me back in business.

Q. Was there anything else that he said that you can now recall?

A. He said if I did that, my sentence wouldn't—I wouldn't be in no trouble or anything. They wouldn't give me very much of a sentence out of it. I might just get a suspended sentence out of the deal.

Q. Was the purpose of that to free Mr. Catrino and you take the sentence, is that the idea?

A. That's right. (R. 73-74.)

\* \* \*

Q. So, you were in and about Missoula after the time the charge was filed against you, in Missoula until about 20 days ago?

A. That's right.

Q. That is the time you referred to having Sam contact you and talk to you about how you should testify during this trial, is that right?

A. That's right.

Q. You said in response to a question by Mr. Taylor that you had not demanded a thousand dollars from Sam Catrino, but your answer was that he offered you some money?

A. He did.

Q. Do you remember how much he offered you?

A. Sam offered me two thousand dollars if I would take the rap." (R. 95.)

Appellant in his brief with reference to the ad-

mission of the foregoing evidence quotes from 20 Am. Jur. Sec. 309, at Page 287, as follows:

“A person, when placed upon trial for the commission of an offense against the criminal laws, is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the indictment against him. It is a well established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, **unless the other offenses are connected with the offense for which he is on trial.**” (Brief of Appellant 25.) (Emphasis ours.)

We do not disagree with the foregoing law, and we note the particular applicability of the last clause, “unless the other offenses are connected with the offense for which he is on trial.” Certainly the evidence to which objection is made was directly connected with the offense for which Catrino was on trial, and the Court properly held that the evidence was admissible on the question of intent. (R. 72.)

The charge to the jury was complete. The Court fully and fairly instructed the jury as to the credibility of a witness. Appellant apparently takes the position that Rennaker was not a credible witness.

In his brief he states:

“We contend that a credible witness does not include a witness who confesses he is a perjurer and, this being true, the Court was in error in not granting our motion for an order for the entry of a judgment of acquittal at the conclusion of the Government’s case or when all the evidence was in.” (Brief of appellant 18.)

The credibility of a witness is, of course, a question for the jury to determine. If we adopt the proposition propounded by appellant, a case for subornation of perjury could seldom, if ever, be proved. Judge Pray properly instructed the jury that they were to judge the credibility of the witnesses and the weight to be given the testimony. (R. 232-233.) The jury has passed upon the credibility of the witnesses. It is urged by appellant that the court should have charged the jury that Rennaker was an accomplice with the defendants as to Count Two of the Indictment, and admitting that they did not make a request for such instruction, urged that the court should have so charged the jury notwithstanding their failure to make the request. (Brief of appellant 16.)

In the case of the United States v. Potash, et al, 118 F. (2d) 54, the Circuit Court of Appeals for the



Second Circuit held as follows:

“Finally, it is urged that the charge was erroneous in that the court failed to tell the jury that the witnesses Loukas and Perry were co-conspirators with Potash and Vafiades and their testimony should be viewed with care and caution. It is enough to say that no such request to charge was made and that this court has held that ‘the warning is never an absolute necessity.’ *United States v. Becker*, 2 Cir., 62 F. 2d 1007, 1009.”

### **THE VERDICT SHOULD BE AFFIRMED**

It is suggested in the brief of appellant at several points that the verdict of the jury in finding Catrino not guilty as to Count One and guilty as to Count Two was arrived at by compromise. On that question the Supreme Court of the United States in the case of *Dunn v. United States*, 284, U. S. 390, held that consistency in the verdict is not necessary. We quote as follows from the opinion:

“The defendant says that the evidence did not warrant a conviction; and that the verdict on the second and third counts is inconsistent with that upon the first, and that for this reason also he is entitled to be discharged. The evidence was the same for all the counts.”

\* \* \*

“Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham v. The Queen*, 5 Best & Smith 635, 642, 643. *Selvester v. United States*, 170 U. S. 262. If separate indictments had been presented against the de-

fendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler v. United States*, 7 F. (2d) 59, 60:

‘The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’

Compare *Horning v. District of Columbia*, 254 U. S. 135.

That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.” 52 S. Ct. 189, 76 L. Ed. 356.

That case is apparently the leading case on this question.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

JOHN B. TANSIL,  
United States Attorney.

HARLOW PEASE,  
Assistant U. S. Attorney.

EMMETT C. ANGLAND,  
Assistant U. S. Attorney.

No. 11989

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United States  
Court of Appeals

for the Ninth Circuit

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JAMES A. NOELL and AMELIA E. NOELL,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Southern District of California  
Central Division

JUN 3 - 1949

PAUL P. O'BRIEN,  
CLERK



United States  
Court of Appeals  
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JAMES A. NOELL and AMELIA E. NOELL,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
for the Southern District of California,  
Central Division

No. 19811

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. NOELL and AMELIA E. NOELL,  
Defendants.

### INDICTMENT

[11 U. S. C. 52 (b) (1) and (2) Concealing Assets  
in bankruptcy; False oath in bankruptcy.]

The Grand Jury charges:

#### Count One

(11 U. S. C. 52 (b) (1))

On or about May 22, 1946 a voluntary petition in bankruptcy was filed in the United States District Court for the Southern District of California, Central Division, by James A. Noell and Amelia E. Noell, defendants herein, as individuals and jointly as partners doing business as Pacific Firm-Bilt; and on May 22, 1946 said defendants and the partnership Pacific Firm-Bilt were duly adjudged bankrupt by said court and said proceedings in bankruptcy were referred generally to Benno M. Brink, referee in bankruptcy, and on December 23, 1946 were transferred and re-referred to Hubert F. Laugharn, referee in bankruptcy, for further proceedings as required by law; and said Benno

M. Brink and Hubert F. Laugharn were duly appointed, qualified, and acting referees in bankruptcy of said court:

On or about May 22, 1946 Crules R. Cheek was duly appointed receiver of the partnership of Pacific Firm-Bilt and gave bond in the sum of \$10,000, which was duly approved on May 23, 1946, and said Crules R. Cheek entered on his duties as said receiver:

On or about June 3, 1946 Crules R. Cheek was duly appointed as trustee of the estates of defendants as individuals and gave bond in the sum of \$2,500.00 [2] as trustee of the estate of defendant Amelia E. Noell, which bond was duly approved on June 6, 1946, and bond in the sum of \$100 as trustee of the estate of defendant James A. Noell, which bond was duly approved on June 7, 1946, and said Crules R. Cheek entered upon the duties of his office of trustee of the individual estates of said bankrupts;

On June 3, 1946 Crules R. Cheek was appointed trustee of the partnership estate, and posted bond in the sum of \$5,000, which bond was duly approved on June 6, 1946, and said Crules R. Cheek entered upon the duties of his office of trustee of the estate of said partnership;

At all times herein mentioned after the appointment and qualification of said Crules R. Cheek as receiver and trustee as aforesaid, said receiver and trustee, Crules R. Cheek, was charged with the con-

trol and custody of all of the assets, money and property, belonging to the individual estates of said defendants and to the estate of the partnership composed of said defendants, and;

Commencing on or about May 23, 1946 and continuing thereafter until on or about the date of the return of this indictment, defendants James A. Noell and Amelia E. Noell, in Los Angeles County, within the Central Division of the Southern District of California, did knowingly and fraudulently conceal from Crules R. Cheek, receiver and trustee as aforesaid, a portion of the assets belonging to the individual estates of said defendants and the estate of the partnership composed of said defendants, namely \$25,000.00 in cash, and one 1941 Chevrolet Tudor Sedan.

### Count Two

(11 U .S. C. 52 (b) (2))

The Grand Jury realleges all of the allegations of the first count of the indictment, except those contained in the last paragraph thereof.

On or about May 22, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Amelia E. Noell did knowingly and fraudulently make a false oath in said bankruptcy proceeding; namely, in Schedule "F," which schedule was attached to and was a part of the voluntary petition in bankruptcy filed by defendants as aforesaid, [3] and purported to list all the property of Amelia E. Noell, and in which schedule appeared the following:

“Schedule F-2 (A. E. Noell) Personal Property

\* \* \* \*

G.—Automobiles and other Vehicles: None.

\* \* \* \*

Schedule F-4 (A. E. Noell)

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

\* \* \* \*

Personal Property: None.”

and at the foot of which Schedule F appeared the following oath:

“I, Amelia E. Noell, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.”

which oath was signed and sworn to by defendant Amelia E. Noell on or about May 22, 1946, before Mabel Swift Doyle, a Notary Public in and for the County of Los Angeles and State of California and authorized to administer oaths;

Which aforesaid statements in Schedule F were false, as defendant Amelia E. Noell then and there well knew, in that defendant Amelia E. Noell had a property interest in a 1941 Chevrolet Tudor Sedan automobile. [4]



## Count Three

1

(11 U. S. C. 52 (b) (2))

The Grand Jury realleges all of the allegations of the first count of the indictment, except those contained in the last paragraph thereof.

On or about June 3, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant James A. Noell did knowingly and fraudulently make a false oath in said bankruptcy proceeding; namely, before Benno M. Brink, Referee in Bankruptcy, sitting in Los Angeles, California, on June 3, 1946, at which time defendant James A. Noell was duly sworn by Benno M. Brink, Referee in Bankruptcy, who then and there had competent authority to administer an oath to said defendant in said proceedings, to testify to the truth, the whole truth, and nothing but the truth in the proceedings then before said referee, and said defendant James A. Noell was thereupon examined and while under oath gave the following testimony:

(Transcript, June 3, 1946, p. 14, l. 22-p. 15, l. 9.)

“Q. [by Mr. Durst] What car did you drive the week before?

A. [by defendant James A. Noell] I drove a car that formerly was Mrs. Noell’s car.

Q. What kind of a car was that?

A. 1941 Chevrolet, two-door sedan.

Q. And was that car clear?

1 A. That car was sold to John Bucemi.

Q. Do you know whether it was clear?

A. Sir?

Q. Do you know whether it was clear or not?

A. It was clear when it was sold to John Bucemi, yes, sir, by Mrs. Noell. It was her car.

Q. And for how much was it sold?

A. Let's see, eight hundred and some odd dollars was the selling price, whatever it was. [5]

\* \* \* \*

(Transcript, June 3, 1946, p. 16, l. 6-10.)

"Q. Who has the pink slip on that Chevrolet automobile?

A. Mr. Bucemi is the owner.

Q. Pardon me; who has the pink slip?

A. I don't know, sir. I presume he should have it. He is the owner.

\* \* \* \*

(Transcript, June 3, 1946, p. 21, l. 24 - p. 22, l. 3.)

Q. [by Referee Brink] All right, when was the last time you had the Chevrolet in your possession, or when was the last time it was in Mrs. Noell's possession?

A. [by defendant James A. Noell] It was in my possession about a week ago. But it was Mr. Bucemi's car. I had borrowed it from him. The title had been transferred and everything so far as I know."

Which testimony was false as the defendant James A. Noell then and there well knew in that his wife, defendant Amelia E. Noell, did have an interest in said 1941 Chevrolet Tudor Sedan auto-

mobile, and had not made a bona fide sale thereof to John Bucemi.

A true bill.

/s/ WALTER L. MOODY,  
Foreman.

/s/ JAMES M. CARTER,  
United States Attorney.

[Endorsed]: Filed Jan. 28, 1948. [6]

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At a stated term, to wit: The February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 24th day of February in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable J. F. T. O'Connor, District Judge.

Title of Cause.]

For hearing on motions: E. J. Zack, Ass't. U. S. Att'y., appearing as counsel for Gov't.; A. B. Rose, Esq., appearing as counsel for defendants, who are present on bond; Attorney Rose makes a statement and moves to quash the Indictment and the Court denies the said motion and allows exception.

Attorney Zack makes a statement. No motions have been filed.

Defendants state their true names are as set forth in Indictment, waive reading of Indictment, and

each defendant pleads not guilty, to all three counts.

Court orders case transferred to Judge Beaumont for setting April 12, 1948. [7]

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At a stated term, to wit: The February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 10th day of June in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Wm. C. Mathes, District Judge.

[Title of Cause.]

For further trial by jury: E. J. Zack, Ass't. U. S. Att'y., appearing as counsel for Gov't.; A. B. Rose, Esq., appearing as counsel for defendants, who are present; and jury and alternate juror being present, and counsel so stipulating, Court orders trial proceed.

Geo. M. Kirk, Jr., heretofore sworn, testifies further.

At 11:15 a. m. Court admonishes the jurors and declares a recess for five minutes. At 11:35 a. m. court reconvenes herein and all being present as before, including defendants and jurors, Witness Kirk testifies further.

At 12:10 p. m. court admonishes the jurors and declares a recess to 1:45 p. m. At 1:55 p. m. court reconvenes herein and all being present as before, including the jurors and defendants, Dennis Ear-

hart is called, sworn, and testifies. U. S. Ex. 100 is marked for ident.

Johnny Richardson is sworn and withdraws from witness stand.

Witness Earhart resumes the stand and testifies further.

Witness Richardson, heretofore sworn, resumes the stand and testifies. U. S. Ex. 101 for ident. is so marked. There is no cross-examination of Witness Richardson.

Theodore Petersen is called, sworn, and testifies for Gov't. and U. S. Ex. 102 is marked for ident.

Louise Todd Knapp is called, sworn, and testifies for Gov't., and U. S. 103 is marked for ident.

Anna Glasbrenner is called, sworn, and testifies for Gov't., and U. S. Ex. 104 is marked for ident.

U. S. Ex. 91, U. S. Ex. 6 and 7, and U. S. Ex. 40, 90, and 99 are received in evidence. Court admonishes the jurors and declares a recess for a few minutes. [8]

Court reconvenes herein and all being present as before, including defendants and jurors; Original of U. S. Ex. 88 for ident. is produced and pursuant to stipulation is deemed offered and received in evidence as U. S. Ex. 88-A in presence of jurors. Gov't. rests.

In the absence of the jury Attorney Rose moves separately for acquittal of defendant Amelia E.



Noell and Court denies said motion without prejudice.

At 4:05 p. m. jurors return into court and cause is re-opened. U. S. Ex. 88-A for ident. is received in evidence by stipulation. Gov't. rests.

Clarence Palm is called, sworn, and testifies for defendants.

At 4:30 p. m. Court admonishes the jurors and declares a recess in this trial to 9:30 a. m., June 11, 1948. [9]

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At a stated term, to wit: The February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 16th day of June in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Wm. C. Mathes, District Judge.

[Title of Cause.]

For further trial; E. J. Zack, Ass't. U. S. Att'y., appear as counsel for Gov't.; A. B. Rose, Esq., appearing as counsel for defendants, who are both present; jury is absent; Jack Ambrose, Reporter, is present; court convenes herein at 9 a. m.; counsel agree that the jury may be instructed Friday morning.

At close of evidence, Attorney Rose moves for judgments of acquittal and his motion is denied. Attorney Rose discusses a proposed instruction.

Jury and alternate juror are brought into court and all being present as before, including defendants and counsel, Court orders jurors excused to 10:45 a. m. and admonishes the jurors and excuses them to said time.

In absence of jurors, counsel and the Court continue discussion of proposed instruction. At 10:50 a. m. jurors being absent, defendant and counsel present, counsel further present their views on the proposed instructions and certain changes are made. At 11:55 a. m. jury and alternate juror return into court and defendants and counsel being present, Court admonishes the jurors and declares a recess to 1:30 p. m.

At 1:45 p. m. court reconvenes herein and all being present as before, including defendants and counsel, jurors being absent, counsel discuss proposed instructions.

At 1:54 p. m. jurors return into court and further discussion ensues.

Attorney Zack argues to jury for Gov't. At 3 p. m. court admonishes the jury and declares a recess for five minutes. [10]

At 3:31 p. m. court reconvenes herein and all being present as before, including jurors, defendants, and counsel, Attorney Zack resumes his argument for Gov't. At 3:52 p. m. Attorney Zack concludes his argument. Attorney Rose argues for defendant to the jury at 3:53 p. m.

At 4:12 p. m. Court admonishes the jurors not to discuss this cause and declares a recess to June 17, 1948, 9:30 a. m., for further jury trial. [11]

At a stated term, to wit: The February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 18th day of June in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Wm. C. Mathes, District Judge.

[Title of Cause.]

For further jury trial; E. J. Zack, Ass't. U. S. Att'y., appearing as counsel for Gov't.; A. B. Rose, Esq., appearing as counsel for defendants, who are both present; and jury and alternate juror being absent;

Court and counsel discuss special interrogatories as to count 1 of the Indictment. Attorney Rose objects to proposed special interrogatories which are filed and objection is sustained.

At 9:40 a. m. the jury and alternate juror are brought into court, and defendants and counsel being present, Court instructs the jurors on the law of the case. At 10:15 a. m. Court admonishes the jurors and declares a recess for them, and they leave the court room. In the absence of the jurors, the Court inquires if there are any objections to the instructions and both sides reply they have none; it is stipulated that instruction 25 be given, the jury and alternate juror are returned into Court, and all being present as before, Court concludes instructing the jury.

Thos. R. Keefer, Mitchell Aronson, and E. R. MacManus are sworn as officers to take charge of the jury during its deliberation upon a verdict, and at 10:27 a. m. jurors retire to deliberate and court recesses.

Court resumes the bench, defendants and counsel present, Court excuses the alternate juror. At 11:52 a. m. the jury comes into court and defendants and counsel being present, jury presents verdicts, which are read, and each juror being polled states verdicts as rendered are his own true verdict, Court orders verdicts filed and entered in minutes, said verdicts being as follows: [12]

\* \* \* \*

Court orders cause as to both defendants referred to Prob. Officer for investigation and report and continued to July 12, 1948, 1:30 p. m., for hearing said reports and sentence of both defendants, and that defendants meantime continue on bail and return at said time. [13]

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[Title of District Court and Cause.]

### VERDICT

We, the jury in the above entitled cause, find the defendant James A. Noell Guilty as charged in the First count of the indictment; and Guilty as charged in the Third count of the indictment.

Los Angeles, California, June 18th, 1948.

/s/ EDWARD C. ATKINSON,  
Foreman of the Jury.

[Endorsed]: Filed June 18, 1948. [14]

[Title of District Court and Cause.]

## VERDICT

We, the jury in the above entitled cause, find the defendant Amelia E. Noell Guilty as charged in the First count of the indictment; and Guilty as charged in the Second count of the indictment.

Los Angeles, California, June 18th, 1948.

/s/ EDWARD C. ATKINSON,

Foreman of the Jury.

[Endorsed]: Filed June 18, 1948. [15]

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[Title of District Court and Cause.]

## SPECIAL INTERROGATORIES

We, the jury in the above entitled cause, unanimously find as follows:

Interrogatory: (1) Did the defendant James A. Noell knowingly and fraudulently conceal from Crules R. Cheek, first as receiver and later as trustee in bankruptcy, a sum of money belonging to the bankrupt estate, as charged in Count One of the indictment?

Finding of the Jury ("Yes") or ("No".)

Interrogatory: (2) Did the defendant James A. Noell knowingly and fraudulently conceal from Crules R. Cheek, first as receiver and later as trustee in bankruptcy, a 1941 Chevrolet Tudor Sedan



belonging to the bankrupt estate, as charged in Count One of the indictment?

Finding of the Jury ("Yes") or ("No".)

Los Angeles, California, June . . . ., 1948.

.....,

Foreman of the Jury.

[Endorsed]: Filed June 18, 1948. [16]

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[Title of District Court and Cause.]

### SPECIAL INTERROGATORIES

We, the jury in the above-entitled cause, unanimously find as follows:

Interrogatory: (1) Did the defendant Amelia E. Noell knowingly and fraudulently conceal from Crules R. Cheek, first as receiver and later as trustee in bankruptcy, a sum of money belonging to the bankrupt estate, as charged in Count One of the indictment?

Finding of the Jury ("Yes") or ("No".)

Interrogatory: (2) Did the defendant Amelia E. Noell knowingly and fraudulently conceal from Crules R. Cheek, first as receiver and later as trustee in bankruptcy, a 1941 Chevrolet Tudor Sedan belonging to the bankrupt estate, as charged in Count One of the indictment?

Finding of the Jury ("Yes") or ("No".)

Los Angeles, California, June . . . ., 1948.

.....,

Foreman of the Jury.

[Endorsed]: Filed June 18, 1948. [17]

[Title of District Court and Cause.]

## MOTION FOR JUDGMENT OF ACQUITTAL

The defendant Amelia E. Noell, having heretofore in the above entitled cause presented a motion for Judgment of Acquittal at the close of the evidence offered by the Government, and having made a similar motion for Judgment of Acquittal at the close of all the evidence, said Amelia E. Noell, pursuant to Subdivision (b) of Rule 29 of the Rules of Criminal Procedure, respectfully moves this Court for a Judgment of Acquittal of the offenses charged in Count I of the Indictment herein, and presents this, her similar motion as to Count II of the Indictment herein; and pursuant to said Subdivision (b) of Rule 29, moves that in the event this motion is denied, she be granted a new trial, which said motion is being submitted separately.

/s/ A. BRIGHAM ROSE,  
Attorney for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed June 23, 1948. [18]

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[Title of District Court and Cause.]

## MOTION FOR JUDGMENT OF ACQUITTAL

The defendant James A. Noell, having heretofore in the above entitled cause presented a motion for Judgment of Acquittal at the close of the evidence offered by the Government, and having made a similar motion for Judgment of Acquittal at the

close of all the evidence, said James A. Noell, pursuant to Subdivision (b) of Rule 29 of the Rules of Criminal Procedure, respectfully moves this Court for a Judgment of Acquittal of the offenses charged in Count I of the Indictment herein, and presents this, his similar motion as to Count III of the Indictment herein; and pursuant to said Subdivision (b) of Rule 29, moves that in the event this motion is denied, he be granted a new trial, which said motion is being submitted separately.

/s/ A. BRIGHAM ROSE,  
Attorney for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed June 23, 1948. [20]

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant James A Noell and moves the Court to grant him a new trial in the above styled cause, for the following reasons, to-wit:

1. Because the verdict is contra to the law and the evidence.

2. Because the evidence fails to establish that the parties named in the Bill of Indictment were guilty of the commission of the offenses charged in Counts 1, 2 and 3 of the Indictment.

3. Because the trial Court erred in admitting incompetent evidence tending to prejudice the accused, with respect to consideration by the jury.

of the specific charges contained in the Indictment.

4. Because the trial Court, by reason of his interrogation to witnesses on the stand, had injected an issue foreign to the offenses charged in the Indictment, namely: the issues of the violation of O. P. A. regulations and so-termed "black-market" proceedings.

5. Because the trial Court permitted the prosecution to embark on a course of cross-examination of the accused outside of the scope of the matters testified to by them on direct examination and on their examination in chief.

6. That the Court and the Government's counsel were guilty of prejudicial misconduct in permitting an inference to be raised in the above cause that it was incumbent upon the defendant to negative issues created by the prosecution, not through competent evidence, but through the expediency of suspicion and conjecture based on issues presented in the Indictment, but in respect to which no legal proof was offered.

Wherefore this defendant prays that the Court set aside the verdict of the jury and grant the defendant a new trial.

/s/ A. BRIGHAM ROSE,

Attorney for Defendant James A. Noell and Amelia E. Noell.

Approved:

/s/ JAMES A. NOELL.

Points and Authorities to Follow.

(Acknowledgment of Service.)

[Endorsed]: Filed June 23, 1948. [23]

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant Amelia E. Noell and moves the Court to grant her a new trial in the above styled cause, for the following reasons, to-wit:

1. Because the verdict is contra to the law and the evidence.

2. Because the evidence fails to establish that the parties named in the Bill of Indictment were guilty of the commission of the offenses charged in Counts 1, 2 and 3 of the Indictment.

3. Because the trial Court erred in admitting incompetent evidence tending to prejudice the accused, with respect to consideration by the jury of the specific charges contained in the Indictment.

4. Because the trial Court, by reason of his interrogation to witnesses on the stand, had injected an issue foreign to the offenses charged in the Indictment, namely: the issues of the violation of O. P. A. regulations and so-termed "black-market" proceedings.

5. Because the trial Court permitted the prosecution to embark on a course of cross-examination of the accused outside of the scope of the matters testified to by her on direct examination and on her examination in chief.

6. That the Court and the Government's counsel were guilty of prejudicial misconduct in permitting an inference to be raised in the above cause that it was incumbent upon the defendant to negative



issues created by the prosecution, not through competent evidence, but through the expediency of suspicion and conjecture based on issues presented in the Indictment, but in respect to which no legal proof was offered.

Wherefore this defendant prays that the Court set aside the verdict of the jury and grant the defendant a new trial.

/s/ A. BRIGHAM ROSE,

Attorney for Defendant James A. Noell and Amelia E. Noell.

Points and Authorities to Follow.

(Acknowledgment of Service.)

[Endorsed]: Filed June 23, 1948. [27]

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At a stated term, to wit: The February Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 12th day of July in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable: Wm C. Mathes, District Judge.

[Title of Cause.]

For hearing (1) motion of defendants for judgment of acquittal, (2) motions for a new trial, and (3) Probation Reports and sentence; E. J. Zack, Ass't U. S. Att'y, appearing as counsel for Gov't;

A. B. Rose, Esq., appearing as counsel for defendants, who are present;

Attorney Rose presents motions; Court denies (1) motion of defendants for judgment of acquittal; and (2) for new trial;

Defendant Amelia Noell states she is not guilty; defendant James E. Noell makes a statement; Attorney Rose makes a statement for both defendants;

Attorney Zack recommends sentence of three year imprisonment for each defendant; Court pronounces judgment on each defendant as follows:

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District Court of the United States for the  
District of California, Central Division

No. 19811

United States of America vs. James A. Noell

Criminal Indictment [for violation of 11 U.S.C.  
52(b) (1) and (2)]

### JUDGMENT AND COMMITMENT AND PROBATIONARY ORDER

On this 12th day of July, 1948, came the attorney for the government and the defendant appeared in person and with his counsel, A. Brigham Rose, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of having on or about May 23, 1946, knowingly and fraudulently concealed from the receiver and trustee a portion of the assets belonging to the individual estates of the defendants and the estate of the partnership composed of the

defendants, both estates being in bankruptcy, of \$25,000 in cash and one 1941 Chevrolet Sedan; and having on June 3, 1946, before the Referee in Bankruptcy at Los Angeles, made a false oath in proceedings before him, as charged in Counts One and Three of the indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the First Count of the indictment;

It Is Further Adjudged that imposition of sentence for the offense charged in the Third Count of the indictment be and is hereby suspended and the defendant is placed on probation for the period of five years commencing upon his release from custody following execution of the sentence imposed under Count One of the indictment; and the conditions of probation are hereby fixed as follows: during the probationary period the defendant shall (1) pay to the United States of America a fine of \$5,000 at such times and in such installments as the Probation Officer of this Court shall direct; (2) obey all laws applicable to his conduct; and (3) comply with

all rules which the Probation Officer of this Court shall prescribe for the guidance of his personal conduct.

It Is Further Adjudged that the defendant's bail be exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,  
United States District Judge.

Filed July 12, 1948.

EDMUND L. SMITH,  
Clerk.

By /s/ LOUIS J. SOMERS,  
Deputy Clerk. [29]

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District Court of the United States for the Southern  
District of California, Central Division

No. 19811

United States of America vs. Amelia E. Noell  
Criminal Indictment [for violation of 11 U.S.C.  
52(b) (1) and (2)]

JUDGMENT AND COMMITMENT AND  
PROBATIONARY ORDER

On this 12th day of July, 1948, came the attorney for the government and the defendant appeared in person with her counsel, A. Brigham Rose, Esquire.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty and verdict of guilty of the offenses of having on or about May 23, 1946, knowingly and fraudulently concealed from the receiver and trustee a portion of the assets belonging to the individual estates of the defendants and the estate of the partnership composed of the defendants, both estates being in bankruptcy, of \$25,000 in cash and one 1941 Chevrolet Sedan; and having on May 22, 1946, made a false oath in proceedings under the Bankruptcy Act, as charged in Counts One and Two of the indictment; and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the First Count of the indictment;

It Is Further Adjudged that imposition of sentence for the offense charged in the Second Count of the indictment be and is hereby suspended, and the defendant is placed on probation for the period of five years commencing upon her release from custody following execution of the sentence imposed



under Count One of the indictment; and the conditions of probation are hereby fixed as follows: during the probationary period the defendant shall (1) pay to the United States of America a fine of \$5,000 at such times and in such installments as the Probation Officer of this Court shall direct; (2) obey all laws applicable to her conduct; and (3) comply with all rules which the Probation Officer of this Court shall prescribe for the guidance of her personal conduct.

It Is Further Adjudged that execution of judgment and sentence imposed under Count One of the indictment be stayed until 2 p.m. on July 19, 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,  
United States District Judge.

Filed July 12, 1948.

EDMUND L. SMITH,  
Clerk.

By /s/ LOUIS J. SOMERS,  
Deputy Clerk.

[30]

[Title of District Court and Cause.]

## NOTICE OF APPEAL

The above named defendants hereby file this, their Notice of Appeal, to the United States Circuit Court of Appeals for the Ninth Circuit.

Name and Address of Appellants: James A. Noell, 124 West Pomona Ave., Monrovia, Calif. Amelia E. Noell, 124 West Pomona Ave., Monrovia, Calif.

Appellants Attorney: A. Brigham Rose, 408 South Spring St., Los Angeles, California, Michigan 7455.

Offense Charged as Against James A. Noell; and Amelia E. Noell: Count 1: Concealing assets in bankruptcy;

Offense Charged as Against Amelia E. Noell: Count 2: False oath in bankruptcy.

Offense Charged as Against James E. Noell: Count 3: False oath in bankruptcy. [31]

### Concise Statement of Judgment:

Both defendants and appellants were sentenced to imprisonment for a period of three years on count 1.

Amelia E. Noell on count 2 was placed on probation for a period of five years and ordered to pay a fine of \$5,000.00.

James A. Noell on count 3 was placed on probation for a period of five years and ordered to pay a fine of \$5,000.00.

Judgment on each defendant was entered on July 12, 1948.

Defendants and appellants are in custody of U. S. Marshal.

JAMES A. NOELL and  
AMELIA E. NOELL,  
Defendants and Appellants,

By /s/ A. BRIGHAM ROSE  
Their attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed July 19, 1948.

—  
[32]

[Title of District Court and Cause.]

## STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Come now James A. Noell and Amelia E. Noell, and having filed an Appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the Court herein made on July 12, 1948, and they respectfully designate the points upon which they intend to rely on the Appeal herein:

### STATEMENT OF POINTS

1. The Court erred in denying the motion of the appellants for a judgment of acquittal.

(a) At the conclusion of the Government's case.

(b) At the conclusion of the whole case.

(c) After the rendition of the verdict by the jury.

2. That the Court erred in confirming the verdict of the jury.

3. That the Government's case was wholly predicated on the fallacious doctrine of presumption of continued possession. [34]

4. The Government's case is wholly lacking in evidence to establish or reflect possession of any assets at the time of the appointment of the referee or trustee.

5. The proofs are wholly lacking in the establishing of any property at the time of the filing of the petition in bankruptcy by the appellants herein.

6. There is no evidence that Amelia E. Noell had anything whatsoever to do with the transaction asserted to have been had in respect to the Chevrolet automobile between J. P. Buscemi and James A. Noell.

7. The verdict of the jury herein returned and approved by the Trial Court is erroneous in that the same is contrary to law and is not supported by the evidence presented in the proceedings.

8. That the statements made in the schedules by Amelia E. Noell in respect to any interest in the Chevrolet automobile, were clearly justified under the facts established by the evidence.

9. That the answers made by the defendant, James A. Noell in respect to the Chevrolet automobile were unqualifiedly true and correct and could not possibly constitute a false oath.

10. That the Court erred in refusing to strike the testimony of the witness Kirke, which was merely opinion evidence in view of his admission that he

was arbitrarily rejecting the matters set forth in the bankruptcy schedules in regard to the disbursement to Schules of Fifteen Thousand (\$15,000.00) Dollars.

11. That the Court erred in admitting into evidence the testimony of the Postmaster at Roseburg, Oregon, for the purposes for which it was tendered.

12. The Court erred in receiving into evidence an envelope addressed to Schules, and returned for the purposes for which it was tendered.

13. That the Court erred in its prejudicial observations [35] in respect to the black market transactions elicited during the testimony of the defendant, James E. Noell and Louis Stroh.

14. The Court erred in the manner in which the claim of James A. Noell of immunity was handled in the presence of the jury.

15. The Court erred in permitting the Government's attorney to cross-examine the defendants and appellants as to matters which they were not examined on in their examination in chief. The injury was designed for the manifest purpose of presenting fallacious inferences to the jury.

16. The Court erred in permitting the enlarged charts of an asserted analysis made by the witness Kirke to be displayed to the jury in view of the manner in which said charts were set up and the characterizations therein reflected designed to emphasize the views of the expert witness Kirke, as distinguished from any factual matters in evidence.

17. That the evidence presented by the Govern-



ment as a whole failed to merely establish that certain moneys had come into the possession of defendant at a time prior to the appointment of the receiver and trustee in bankruptcy, and that the Government's case entirely rests on the contention that said form of possession created a presumption that said moneys were in possession of the defendants at the time of bankruptcy.

The above in general constitute the points to be relied on on appeal.

/s/ A. BRIGHAM ROSE

Attorney for Defendants and Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 3, 1948.

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[36]

[Title of District Court and Cause.]

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Now comes James A. Noell and Amelia E. Noell, appellants herein, having filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit herein, and herewith designate the portion of the records of proceedings and evidence to be contained in the record on appeal herein, said designation herein referred to being as follows, to-wit:

1. The indictment returned herein.
2. The minutes reflecting the arraignment and the plea of the defendants.

3. The opening statement of Government's counsel.

4. Phonographic reporter's transcript of the evidence received at the time of trial, deleting therefrom, however, the extensive comments made by the Clerk in respect to the identification of the various exhibits.

5. The written motion for judgment of acquittal. [38]

6. The minutes reflecting the making of the aforesaid motion at the close of the Government's case.

7. The minutes reflecting the making of the aforesaid motion at the close of the whole case.

8. The minutes reflecting the motion renewed and filed five (5) days after the jury was discharged.

9. The motion for new trial.

10. The minutes reflecting the ruling of the Trial Court on each of the said motions.

11. The verdict of the jury.

12. The judgment and sentence.

13. The notice of appeal to the Ninth Circuit.

14. Designation of points on appeal.

15. Designation of contents of the record of appeal.

Appellants further designate and request that the portions of the foregoing documents referred to, containing and setting forth the title of the Court and the cause be omitted from said papers, save and excepting the title in the indictment. Appellants further submit that they intend to apply for leave

to have the original exhibits transmitted and apply for leave to file four (4) official copies of the reporter's transcript in lieu of a printed record.

/s/ A. BRIGHAM ROSE

Attorney for Defendants and Appellants.

(Acknowledgment of Service.)

[Endorsed:] Filed Aug. 3, 1948.

[39]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR DOCKET-  
ING RECORD ON APPEAL**

Upon application of A. Brigham Rose, attorney of record for the above named defendants and appellants, for an order enlarging the time, pursuant to Rule 73, Subdivision G of the Federal Court Rules, in which to docket the record on appeal with the Circuit Court, now on motion by said attorney for the defendants and appellants, and upon consent of the Government, as per the Stipulation hereto annexed,

It Is Hereby Ordered that defendants and appellants above named may have up to and including the 18th day of October, 1948 within which to docket the appeal in the Ninth Circuit Court of Appeals, as provided in Subdivision G of Rule 73 of the Federal Court Rules.

Dated: This 26th day of August, 1948.

/s/ WM. C. MATHES

United States District Judge [41]

[Endorsed]: Filed Aug. 26, 1948.

[Title of District Court and Cause.]

STIPULATION FOR ENLARGEMENT OF  
TIME TO DOCKET RECORD ON  
APPEAL

Whereas, counsel for the respective parties in the above entitled proceeding are currently endeavoring to reach an agreement by stipulation as to the record acceptable to both parties on appeal in this cause; and

Whereas, the various official court reporters who reported parts of the proceedings have been engaged in recording proceedings in other causes, and it is mutually agreed that an extension of time will be required beyond the time provided for by the Federal Court Rules for the docketing of the record on appeal with the Circuit Court;

It Is Stipulated that an order may be made and entered herein, as provided by Subdivision G of Rule 73 of the Federal Court Rules, enlarging the time for the docketing of the record on appeal to the period of ninety (90) days, as provided by said Subdivision G of Rule 73 of the Federal Court Rules. [42]

Notice of Appeal herein was filed on the 19th day of July, 1948.

JAMES M. CARTER,

United States Attorney,

By: /s/ NORMAN W. NEUKOM

Attorney for Plaintiff and Appellee

/s/ A. BRIGHAM ROSE,

Attorney for Defendants and Appellants.

[Endorsed]: Filed Aug. 26, 1948.

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Comes now the appellee, United States of America, by Ernest J. Zack, Assistant United States Attorney, and in connection with the designation filed by appellants James A. Noell and Amelia E. Noell, in the District Court in the above-entitled cause on August 3, 1948, counter-designates the following additional portions of the record, proceedings, and evidence to be contained in the Record on Appeal:

1. Complete reporter's transcript of the evidence and proceedings at the trial, including the argument of counsel.
2. All exhibits introduced in evidence.
3. The instructions given by the trial court.
4. The alternative form of verdict proposed by the Court.

JAMES M. CARTER,  
United States Attorney

NORMAN W. NEUKOM and  
ERNEST J. ZACK

Assistant U. S. Attorneys

By /s/ ERNEST J. ZACK

Attorneys for Plaintiff and Appellee

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 13, 1948.



[Title of District Court and Cause.]

### AFFIDAVIT

State of California,  
County of Los Angeles—ss.

A. Brigham Rose, being duly sworn, deposes and says:

That he is the attorney for the defendants and appellants in the above entitled proceeding.

Following the conclusion of the trial of the above entitled action, several of the Official Court Reporters who had recorded the proceedings had at the time of trial in this action were engaged for a substantial period of time in recording the proceedings in the case of U. S. -vs- Kawakita, in which a daily transcript was involved; that affiant has deposited on account of the costs of preparing a reporter's transcript the sum of \$2500.00, in behalf of the defendants, and that this transcript is currently in the process of being prepared for use on appeal in behalf of the defendants and appellants. Affiant is informed that this record will not be available [46] until sometime in November, 1948, and that under the Order of Court for enlarging the time heretofore made for the docketing of the record on appeal, the time will expire October 19, 1948. Affiant submits that for said reason an additional Order should be made enlarging the time for the docketing of the record on appeal until November 30, 1948,

and submits herewith an Order extending the time in accordance with the matters herein set forth, to which the Government consents.

/s/ A. BRIGHAM ROSE

Subscribed and sworn to before me this 19th day of October, 1948.

(Seal) /s/ MAUD RICHARDSON

Notary Public in and for the County of Los Angeles, State of California.

Consent to Order Enlarging Time for Docketing  
Record on Appeal

The undersigned consent to the proposed Order hereunto annexed.

JAMES M. CARTER,  
United States Attorney

By: /s/ ERNEST J. ZACK  
Attorney for Plaintiff and Appellee

/s/ A. BRIGHAM ROSE  
Attorney for Defendants and Appellants.

[Endorsed]: Filed Oct. 22, 1948.

[47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-  
ING RECORD ON APPEAL

Upon application of A. Brigham Rose, attorney of record for the above named defendants and appellants for an Order enlarging the time in which to docket the record on appeal with the Circuit

Court, now on motion of said attorney for the defendants and appellants, and upon consent of the Government, as per Stipulation hereto annexed, It Is Hereby Ordered that the defendants and appellants above named may have up to and including the 30th day of November, 1948 within which to docket the appeal with the Ninth Circuit Court of Appeals, as provided by the Federal Court Rules.

Dated: This 19th day of October, 1948.

/s/ WM. C. MATHES

United States District Judge.

[Endorsed]: Filed Oct. 22, 1948.

[48]

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between counsel for the parties to the above entitled action,

That an order may be made that the original exhibits received in evidence during the trial of said cause be transmitted to the United States Court of Appeals for the 9th Circuit, as part of the record on appeal in the within action.

Dated: November 24, 1948.

JAMES M. CARTER,

U. S. Attorney

By /s/ NORMAN W. NEUKOM

Deputy

Attorney for Plaintiff & Appellee

/s/ A. BRIGHAM ROSE

Attorney for Defendants and Appellants.

[Endorsed]: Filed Nov. 24, 1948.

[Title of District Court and Cause.]

### ORDER

On reading and filing the annexed stipulation by and between counsel for the parties to the above entitled cause,

It Is Hereby Ordered that the original exhibits offered, or received, in evidence during the trial of the above captioned proceeding be transmitted to the United States Court of Appeals for the 9th Circuit, in lieu of copies thereof.

Dated: November 24, 1948.

/s/ WM. C. MATHES

Judge of the District Court of the United States.

[Endorsed]: Filed Nov. 24, 1948.

————— [50]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 50, inclusive, contain full, true and correct copies of Indictment; Minute Orders entered February 24, 1948, June 10, 16 and 18, 1948; Verdict as to each of the defendants; Form of Special Interrogatories as to each of the defendants; Motion for Judgment of Acquittal as to each of the defendants; Motion for New Trial as to each of the defendants; Minute Order

Entered July 12, 1948; Judgment, Commitment and A Probation Order as to each of the defendants; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Contents of Record on Appeal; Counter-Designation of Contents of Record on Appeal; Two Orders Extending Time to File Record on Appeal and Stipulation and Order for Transmission of Original Exhibits which, together with copy of reporter's transcript of proceedings on May 25, 26, 27 and 28, June 2, 3, 4, 8, 9, 10, 11, 15 and 18 and July 12, 1948 and original United States exhibits 1, 2, 3, 4, 4-a to 4-j, 5 to 24, 25a, 25b, 26 to 37, 38-a to 38-c, 39 to 48, 49, 49-a, 50 to 53, 53-a to 53-m, 54, 54a to 54-p, 55, 55a, 55b, 56, 56-a to 56-g, 57 to 70, 70-a, 70-b, 71 to 92, 92-a, 93 to 104 and Defendants' Original exhibits A to G, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$13.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 29 day of November, A.D. 1948.

(Seal)

EDMUND L. SMITH,  
Clerk



[Endorsed]: No. 11989. United States Court of Appeals for the Ninth Circuit. James A. Noell and Amelia E. Noell, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 30, 1948.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 11989

JAMES A. NOELL and AMELIA E. NOELL,  
Appellants,

vs.

THE UNITED STATES OF AMERICA,  
Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY  
ON APPEAL

1. The Court erred in denying the motion of the appellants for a judgment of acquittal.

- (a) At the conclusion of the Government's case.
- (b) At the conclusion of the whole case.
- (c) After the rendition of the verdict by the jury.

2. That the Court erred in confirming the verdict of the jury.

3. That the Government's case was wholly predicated on the fallacious doctrine of presumption of continued possession.

4. The Government's case is wholly lacking in any evidence to establish or reflect possession of any assets at the time of the appointment of the referee or trustee.

5. The proofs are wholly lacking in the establishing of any property at the time of the filing of the petition in bankruptcy by the appellants herein.

6. There is no evidence that Amelia A. Noell had anything whatsoever to do with the transaction asserted to have been had in respect to the Chevrolet automobile between J. P. Buscemi and James A. Noell.

7. The verdict of the jury herein returned and approved by the Trial Court is erroneous in that the same is contrary to law and is not supported by the evidence presented in the proceedings.

8. That the statements made in the schedules by Amelia E. Noell in respect to any interest in the Chevrolet automobile, were clearly justified under the facts established by the evidence.

9. That the answers made by the defendant, James A. Noell in respect to the Chevrolet automobile were unqualifiedly true and correct and could not possibly constitute a false oath.

10. That the Court erred in refusing to strike the testimony of the witness Kirke, which was merely opinion evidence in view of his admission that he was arbitrarily rejecting the matters set forth in the bankruptcy schedules in regard to the disbursement to Schules of Fifteen Thousand (\$15,000.00) Dollars.

11. That the Court erred in admitting into evidence the testimony of the Postmaster at Roseburg, Oregon, for the purposes for which it was tendered.

12. The Court erred in receiving into evidence an envelope addressed to Schules, at Roseburg, Oregon.

13. That the Court erred in its prejudicial observations in respect to the black market transactions elicited during the testimony of the defendant, James E. Noell and Louis Stroh.

14. The Court erred in the manner in which the claim of James A. Noell of his rights to not incriminate himself was handled in the presence of the jury.

15. The Court erred in permitting the Government's attorney to cross-examine the defendants and appellants as to matters which they were not examined on in their examination in chief. The inquiry was designed for the manifest purpose of presenting fallacious inferences to the jury.

15. The Court erred in permitting the enlarged charts of an asserted analysis made by the witness, Kirke, to be displayed to the jury in view of the

manner in which said charts were set up and the characterizations therein reflected designed to emphasize the view of the expert witness Kirke, as distinguished from any factual matters in evidence.

17. That the evidence presented by the Government as a whole tended to merely establish that certain moneys had come into the possession of defendants at a time prior to the appointment of the receiver and trustee in bankruptcy, and that the Government's case entirely rests on the contention that said former possession created a presumption that said moneys were in possession of the defendants at the time of bankruptcy.

18. The Government's counsel was guilty of misconduct in his cross-examination of the defendants and appellants in regard to the person named Schules, the manner of examination manifestly being intended to cast doubt upon the transaction with the said Schules which was privileged.

19. The Court erred in receiving into evidence the multitudinous exhibits offered by the Government, which were at no time shown, exhibited or in any wise presented to the jury, i. e. in the Trial Court. No exhibits were ever shown or exhibited by the jury at any stage of the trial.

20. The Indictment was procured contrary to law in that it is manifest that the record of bankruptcy proceedings before the Referee were presented to the grand jury and the record further discloses that appellants counsel moved to quash the Indictment upon that ground.

DESIGNATION OF RECORD

The appellants above-named hereby designate that the record to be relied on upon appeal herein be the typewritten record of the official court reporters who recorded the proceedings at the time of trial. The Exhibits received and offered in evidence:

1. The clerk's transcript of the Indictment;
2. The minutes of the proceedings had;
3. All matters therein contained.

Respectfully submitted

/s/ A. BRIGHAM ROSE

Attorney for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 17, 1949. Paul P. O'Brien, Clerk.





No. 11989.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JAMES A. NOELL and AMELIA A. NOELL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANTS' OPENING BRIEF.

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A. BRIGHAM ROSE,

801 Continental Building, Los Angeles 13,

*Attorney for Appellants.*



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No. 11989.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JAMES A. NOELL and AMELIA A. NOELL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLANTS' OPENING BRIEF.

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### Statement of Case.

The case is here upon a joint appeal [Tr. 27]<sup>1</sup> by defendants, husband and wife, from judgments of imprisonment and fine, entered in the District Court of the United States for the Southern District of California, Central Division [Tr. 22, 24] upon verdicts of "guilty" [Tr. 14, 15] under a 3-count indictment charging violations of 11 U. S. C. 52(b)(1)(2) [Tr. 2], to which pleas of not guilty were interposed after their motion to quash was denied [Tr. 8, 9], as were their motions for acquittal (*F. R.*

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<sup>1</sup>*Abbreviations: Transcript of Record is herein cited as Tr.; Reporter's Transcript as R. T. Italics are the writer's unless contra noted.*

*Cr. P.*, Rules 29, 37(a-2) [Tr. 17], and for a new trial [Tr. 18, 20, 21].<sup>2</sup>

Defendants were charged with the concealing of \$25,000.00 and a car and making false oaths. Twelve days were consumed in the trial, the transcription of whose proceedings consumed 1,325 pages, excluding exhibits, of which there were some 150, none of which were read to or by the jury, who returned their verdicts after one hour and 25 minutes' absence from the courtroom!

Each defendant was sentenced to 3 years' imprisonment under Count I. Sentence was suspended and 5 years' probation granted defendant James A. Noell, under Count III, upon condition that he pay a fine of \$5,000.00 [Tr. 23]. A similar sentence and probationary term was imposed upon defendant Amelia E. Noell, under Counts I and II [Tr. 24].

The original exhibits are here by order of the trial court [Tr. 39] and this Court ordered that a typewritten record of the oral proceedings be, and a complete transcript thereof is, filed (*F. R. Cr. P.*, Rule 39(b); 28 *U. S. C.*, Sec. 1915(b)).

Appellants specify twenty grounds for reversal, some of which may be grouped and discussed together under appropriate caption headings, and one of which challenges the sufficiency of the evidence to support the several ver-

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<sup>2</sup>Motions for acquittal were exhaustively argued at the close of plaintiff's case in chief and after the verdicts [R. T. 934, 1274].

dicts. As the prejudicial aspects of other errors cannot be otherwise fully appraised (*F. R. Cr. P.*, Rule 52(a)), a complete statement of facts will be presented in the argument of the insufficiency of the evidence.

### **Jurisdiction.**

Count I of the indictment, returned by a grand jury in the Southern District of California, Central Division, on January 28, 1948, charges defendants on said date and since May 23, 1946, with the concealment of \$25,000.00 and an automobile, from the trustee and receiver appointed by the Bankruptcy Court in said district, wherein they were adjudged bankrupts individually and as partners doing business as Pacific Firm-Bilt, contrary to 11 *U. S. C.* 52(b-1). Count II charges defendant, Amelia E. Noell, with a false oath in Schedule "F" of her bankruptcy petition on May 22, 1946, in the same proceeding and district, to the effect that she had no property interest in a 1941 Chevrolet Tudor Sedan automobile, contrary to 11 *U. S. C.* 52(b-2). Count III attempts to charge that defendant James A. Noell falsely swore before said Bankruptcy Court in said matter and district on June 3, 1946, that defendant Amelia E. Noell had sold and no longer owned said automobile, contrary to 11 *U. S. C.* 52(b-2). Defendants pleaded "not guilty" to each count, and upon entry of judgments of conviction on July 12, 1948 [Tr. 22, 24] appealed to this Court on July 19, 1948 [Tr. 27] which has jurisdiction thereof (28 *U. S. C.*, Secs. 1291, 1294(1); *F. R. Cr. P.*, Rule 37).



### Statement of Facts.

Defendants are husband and wife and formed a partnership named Pacific Firm-Bilt to build houses. She also owned separate property.

The only evidence introduced to support Count I consists of incomplete records of the partnership business and of sales of her separate property by the wife, whence plaintiff's accountant deduced a large cash balance not surrendered to the bankruptcy receiver. His computations excluded many non-recorded partnership purchases and losses, besides the living and personal expenses of defendants. The verdicts were obviously based upon a presumption that, because defendants had certain cash months before bankruptcy, their financial condition was static and so continued despite defendants' uncontradicted evidence to the contrary.

Counts II and III depend entirely for their support upon the uncorroborated testimony of two confessed perjurers, who falsified their testimony in defendants' favor in the Bankruptcy Court that the Chevrolet car was sold, delivered and retained by John Buscemi until he resold it to a third party six months later, and as more particularly appears from the transfer records of the State Department of Motor Vehicles.

The sufficiency of the evidence being challenged, the same is analyzed with some 150 exhibits in the Fact-Brief (Appendix).

**Statement of Points on Which Appellants Intend to  
Rely on Appeal.**

1. The Court erred in denying the motion of the appellants for a judgment of acquittal.
  - (a) At the conclusion of the Government's case.
  - (b) At the conclusion of the whole case.
  - (c) After the rendition of the verdict by the jury.
2. That the Court erred in confirming the verdict of the jury.
3. That the Government's case was wholly predicated on the fallacious doctrine of presumption of continued possession.
4. The Government's case is wholly lacking in any evidence to establish or reflect possession of any assets at the time of the appointment of the referee or trustee.
5. The proofs are wholly lacking in the establishing of any property at the time of the filing of the petition in bankruptcy by the appellants herein.
6. There is no evidence that Amelia A. Noell had anything whatsoever to do with the transaction asserted to have been had in respect to the Chevrolet automobile between J. P. Buscemi and James A. Noell.
7. The verdict of the jury herein returned and approved by the Trial Court is erroneous in that the same is contrary to law and is not supported by the evidence presented in the proceedings.
8. That the statements made in the schedules by Amelia E. Noell in respect to any interest in the Chevrolet automobile, were clearly justified under the facts established by the evidence.

9. That the answers made by the defendant, James A. Noell, in respect to the Chevrolet automobile were unqualifiedly true and correct and could not possibly constitute a false oath.
10. That the Court erred in refusing to strike the testimony of the witness Kirk, which was merely opinion evidence in view of his admission that he was arbitrarily rejecting the matters set forth in the bankruptcy schedules in regard to the disbursement to Schueles of Fifteen Thousand (\$15,000.00) Dollars.
11. That the Court erred in admitting into evidence the testimony of the Postmaster at Roseburg, Oregon, for the purposes for which it was tendered.
12. The Court erred in receiving into evidence an envelope addressed to Schueles, at Roseburg, Oregon.
13. That the Court erred in its prejudicial observations in respect to the black market transactions elicited during the testimony of the defendant, James E. Noell and Louis Stroh.
14. The Court erred in the manner in which the claim of James A. Noell of his rights to not incriminate himself was handled in the presence of the jury.
15. The Court erred in permitting the Government's attorney to cross-examine the defendants and appellants as to matters which they were not examined on in their examination in chief. The inquiry was designed for the manifest purpose of presenting fallacious inferences to the jury.
16. The Court erred in permitting the enlarged charts of an asserted analysis made by the witness, Kirk, to be

displayed to the jury in view of the manner in which said charts were set up and the characterizations therein reflected designed to emphasize the view of the expert witness Kirk, as distinguished from any factual matters in evidence.

17. That the evidence presented by the Government as a whole tended to merely establish that certain moneys had come into the possession of defendants at a time prior to the appointment of the receiver and trustee in bankruptcy, and that the Government's case entirely rests on the contention that said former possession created a presumption that said moneys were in possession of the defendants at the time of bankruptcy.
18. The Government's counsel was guilty of misconduct in his cross-examination of the defendants and appellants in regard to the person named Schueles, the manner of examination manifestly being intended to cast doubt upon the transaction with the said Schueles which was privileged.
19. The Court erred in receiving into evidence the multitudinous exhibits offered by the Government, which were at no time shown, exhibited or in any wise presented to the jury, *i.e.*, in the Trial Court. No exhibits were ever shown or exhibited to the jury at any stage of the trial.
20. The Indictment was procured contrary to law in that it is manifest that the record of bankruptcy proceedings before the Referee were presented to the grand jury and the record further discloses that appellants' counsel moved to quash the Indictment upon that ground.

## ARGUMENT AND AUTHORITIES.

### I.

Withholding From the Jury's Perception 150 Exhibits  
Whence the Prosecution and Conviction De-  
pended Is Tantamount to the Denial of a Jury  
Trial as Guaranteed by the Constitution. (Points  
on Appeal Nos. 1, 2, 19.)

### Facts.

The trial commenced May 25, 1948, and extended over the 26th, 27th and 28th days of May, the 2nd, 3rd, 4th, 8th, 9th, 10th, 11th, 15th and 18th days of June, 1948. The 1325 page transcript contains 1225 pages of testimony. The last numbered Government exhibit is "106" which, however, was preceded by some 35 others bearing sub-numbers. Defendants' last exhibit designation is "G." This was the evidence, as identified by its witnesses, and as interpreted by its expert, upon which the convictions were obtained. Its general nature appears in the *Appendix, post*.

Although the jury had to be satisfied beyond a reasonable doubt of the verity and import of that evidence before its interpretation, assembly and use in the auditor's charts<sup>1</sup> could be considered, it was neither read to or by the jury, nor taken to the jury room.<sup>2</sup> While the Court anticipated that they might take the exhibits [R. T. (V) 1260], he "wasn't surprised that it took so short a time for the jury to arrive at a verdict [p. 1292].

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<sup>1</sup>Pltf. Exs. 57, 58; R. T. 291-6, 708, 732; Point II, *post*.

<sup>2</sup>Defense counsel so stated in arguing motion for acquittal and he was not challenged [R. T. 1274].



That hiatus was rendered more prejudicial by the display over defense objections of two charts, prepared by F. B. I. accountant Kirk, which were not only inaccurate and incomplete reflections of defendants' business affairs, but involved matters not before the jury [Pltf. Exs. 57, 58; R. T. 291-6, 708, 732; see, *Point VII, post*].

In general, the only allusion, if any, to their identity came from the clerk as a particular item was marked for identification. He was not called upon to, nor would it have been proper for anyone, before the document was received in evidence, to have disclosed its contents to the jury. But with that perfunctory performance, the jury's enlightenment as to the contents or import of the writings ceased. Thereafter, the practice was for the prosecutor to prove the document by its identification reference, it was received in evidence with 106 others mostly at the close of plaintiff's case<sup>3</sup> and sealed in the archives to mock defendants, whose jury today does not know of their own knowledge that the documentary evidence upon which they convicted them was other than blank pieces of paper, or if they glimpsed any writing thereupon in passing, it could have been the current racing chart.

While such seance might be the stage effect desired by a Houdini, it is not the jury trial vouchsafed by the Constitution, nor here accorded defendants by a jury who, oblivious of the evidence, returned three verdicts against them in *one hour and 25 minutes!* [Tr. 14].

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<sup>3</sup>R. T. (I) 23, 26, 30, 52-4, 108-9, 117; R. T. (III) 677-721, 732, 767; R. T. (IV) 915-26, 929, 961, 1052; R. T. (V) 1143, 1154, 1173.

Government's counsel will not deny that immediately upon retirement of the jury in this cause, impanelment commenced of a jury in the case of *United States v. Kawakita*. It is the latter procedure that consumed most of the time aforementioned. The bailiff had, indeed, been advised of the verdict in this cause some twenty minutes after the jury had retired.

#### Authorities.

(1) The Constitutional vouchsafes a trial by jury to a defendant accused of crime. (*Ibid.*, Amend. VI; *F. R. Cr. P.*, Rule 23.) This includes the right to have the jury determine all facts in issue (*Murray v. U. S.*, 10 F. 2d 409), and precludes the Court's rejection of evidence regarded as improbable. (*Greenberg v. U. S.*, 3 F. 2d 226; *Haigler v. U. S.* (10 Cir.), 172 F. 2d 986, 988).

(2) The mechanics of receiving and marking documents in evidence, as part of the judicial process (*New York & C. M. S. & Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031), is separate and apart from, though a facility for, trial to a jury which contemplates that the evidence upon which their verdict is to be resolved is introduced within their perception.

“Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether judge or jury, of objects which furnish evidence.” (*Thayer's Cas. Evid.*, p. 713.)

“Judicial evidence includes all testimony given by witnesses in court, all documents produced and read by the Court, and all things personally examined by the Court for the purposes of proof.” (*I Chamberlayne, Evid.*, Sec. 7.)

Documentary evidence, therefore, must be either read or shown to the jury who, with the Court’s approval, may also take the same for examination to the jury room.

38 *Cyc.* (Trial) 1335, 1337-8;

*Holmgren v. U. S.*, 217 U. S. 509, 54 L. Ed. 861;

*Winters v. U. S.*, 201 Fed. 845.

It is reversible error to lay a large number of writings, *unread*, before a jury for them to examine or not as they may feel inclined.

*Barber’s Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90, 99;

*State v. McKee*, 73 Conn. 18, 47 Atl. 409, 49 L. R. A. 542, 548, 84 A. L. R. 124.

See, generally:

*People v. Cochran*, 61 Cal. 548, 554;

*People v. Balestieri*, 23 Cal. App. 708, 711-13;

*People v. Dunlop*, 27 Cal. App. 460, 469-70;

*People v. Abrams & Co.*, 112 Cal. App. Supp. 769.

*Higgins v. L. A. Gas & E. Co.*, 159 Cal. 651, 655, holds that the rule permitting the jury to take exhibits with them is an enlargement of the common law whose restrictions were inspired by illiterate jurors.

(3) There is analogy between the denial of due process under the Fifth Amendment where the judge is unmindful of the effect of documents displayed and not seen by the jury during the trial, or the latter is held under circumstances of terrorism whence normal minds are paralyzed and the dropping of an iron curtain between evidence and jury which the triers of fact ought to have considered in reaching their verdict. Otherwise the pretense of a hearing before condemnation would be a sham. Whether or not it be regarded as an abridgment of due process, the intendments of a jury trial were denied.

*Jordan v. Massachusetts* (1912), 225 U. S. 167, 176;

*Tunney v. Ohio* (1927), 273 U. S. 510, 523, 531;

*Frank v. Mangum* (1915), 237 U. S. 309, 335;

*Moore v. Dempsey* (1923), 261 U. S. 86;

*Powell v. Alabama* (1932), 287 U. S. 45, 68.

Thus where an appellate court ordered judgment for defendant, in reversing the trial court's decision for plaintiff whose material evidence was in part erroneously excluded below, it was held, a denial of due process. (*Saunders v. Shaw* (1917), 244 U. S. 317.)

## II.

**There Is No Substantial Evidence to Support the Implied Findings That Either Defendant Concealed Cash From the Bankruptcy Receiver or Trustee, as Alleged in Count I.** (Points on Appeal, 1, 2, 3, 4, 5, 7, 17.)

### **Facts.**

The captioned contention was urged by each appellant in their several motions for an acquittal and a new trial, and argued at length, as appears from the Reporter's Transcript [Tr. 17, 18, 20, 21; R. T. 934, 1274]. Appellants also contend that the evidence is insufficient to support the implied finding that they concealed the car alleged in Count I, but this is separately presented (*Point III, post*). Indeed, there is nothing in the record to indicate whether the verdicts of guilty upon Count I resulted from a finding that defendants concealed cash or car, though the findings of guilt upon Counts II and III, involving alleged false oaths concerning the car, may suggest that the car, and not the cash, was the subject of concealment under Count I.

Plaintiff's case in chief was presented to show generally defendants' income from and expenses in their partnership business, together with the proceeds of sales of real property, comprised of the separate property of the wife. Plaintiff had access to and examined the books of account and records of defendants before trial, as did the Bankruptcy Court and its trustee. Plaintiff introduced in evidence a large number of business records, cancelled



checks, and bank statements, to show the financial condition of defendants' estate during the operation of the partnership and to and including their adjudication in bankruptcy. Upon that foundation, F. B. I. accountant Kirk prepared and expounded to the jury two charts [Exs. 57, 58] containing an alleged summary of defendants' income and outlays during said period, to show, so he claimed, approximately \$32,000.00 received by defendants and unaccounted for. The unfairness of this presentation, however, is derived from several circumstances, besides the contention in Point I, that the foundational documents were never made accessible to the jury.

*First:* Mr. Kirk admittedly confined his summary<sup>4</sup> to these business records of defendants which they had surrendered to the Bankruptcy Court. It is undisputed that defendants' books of accounts were kept by a part-time bookkeeper, who called intermittently to post the entries therein, and that before the partnership business ceased operating, about the middle of May, 1946, bookkeeping was not carried on. The defendants are not on trial for a failure to keep books, nor is there any evidence that their failure to complete their postings before bankruptcy was due to any ulterior motive. Judicial notice may be taken of the fact that during that period all kinds of office help was at a high premium, and because of their financial difficulties and harassment by creditors defendants' affairs were naturally confused. They did, however, deliver to the receiver all memoranda of transactions not posted in their books.

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<sup>4</sup>His charts [Exs. 57, 58] are challenged as inadmissible in Point VII, *post*.

*Second:* There is another circumstance which demonstrates a further fallacy in Mr. Kirk's summary. It would appear beyond question that in so far as the partnership business was concerned, the same was insolvent and unable to pay its creditors as early as April, 1946. There is no evidence that defendant, James A. Noell, owned any property or had any income outside of the partnership. Conversely, the defendant wife owned several parcels of property, as her separate estate, which she liquidated during the latter period of the partnership in an endeavor to satisfy creditors and keep the business afloat. While *her* income from that or any other source during the time in question would be pertinent to the question of *her* concealment of assets, the same is entirely immaterial and irrelevant in so far as defendant husband's alleged concealment is concerned. Notwithstanding, Mr. Kirk, in his summary and presentation, included the wife's receipts from sales of her separate property with the joint receipts of defendants, and finding a balance of cash unaccounted for in the partnership records, characterized the same as concealment, which he and the Government attributed to BOTH defendants.

The evidence conclusively shows that, excepting for such tangible physical property as was surrendered to the bankruptcy receiver, the partnership was virtually destitute of cash months before the bankruptcy adjudication.

The foregoing was the only joint property that defendants owned or controlled, and is all of the property that they could have jointly concealed. While the evidence shows that the defendant wife did in fact use her proceeds from sales of property in the partnership business, there is no evidence that any surplus between her said receipts

and investments thereof in the partnership was ever under the control of or concealed by defendant husband.

As is apparent from a cursory examination thereof, the books of account surrendered by defendants to the Bankruptcy Court, and used by Mr. Kirk in his summary, do not purport to be the books of account of defendant wife or husband concerning their personal business or separate assets.

It would require a reproduction of the entire Reporter's Transcript of testimony to show in detail the foundation for the Government's contention. For purposes of this appeal no need is perceived therefor. The Appendix contains a summary of all of the documentary evidence. Plaintiff's contention that defendants concealed over \$32,000.00 is based upon the following fallacies:

*First:* There is to be deducted the item of \$15,000.00, which defendant husband advanced to Schueles for the purchase of lumber in Oregon, and of which no record was made in the partnership books.

*Second:* Insofar as *joint* concealment is concerned, there must be deducted from the cash receipts described by Mr. Kirk the proceeds from the wife's sales of separate property.

*Third:* There is no evidence that defendant husband had any cash assets or income after the partnership business ceased operating, or that defendant wife had any cash assets or income except from the proceeds of the sales of her separate property. It is conceded that from these proceeds she expended \$16,636.58 in behalf of the partnership and family expenses. Defendants not only had the expenses of their family to maintain and that in-

cidental to the winding up of their business, but also legal and other expenses.

*Fourth:* Each defendant testified unequivocally that neither of them had any cash or assets, excepting personal effects, that were not surrendered to the bankruptcy receiver. There is no indication of any high living or extravagance, such as debtors with concealed assets of over \$30,000.00, might be expected to occasionally indulge. On the contrary, there are compelling circumstances which indicate that defendants were as impoverished as their bankruptcy petitions portray. Defendant husband was experienced in business and a person of ordinary education. It would hardly be expected of one of his ability, with any substantial sum of money available, resorting to menial labor and the driving of a taxicab.

*Fifth:* Neither defendant was indicted for filing a false schedule nor for false swearing concerning cash assets, as was done in the case of the car (Counts II and III) and is to have been expected as to any money which the Government really believed was withheld. Plaintiff finally admitted to the trial court when sentences were pronounced that, despite audits and investigations by the bankruptcy trustee and F. B. I., numerous examinations in the Bankruptcy Court from June, 1946, into 1947, that the Government had been unable to discover one penny in defendants' possession or under their control after their assets were surrendered to the receiver upon his qualification in May, 1946 [R. T. (V) 1316, 1318]. In response to the Court's inquiry, the prosecutor said: "We don't know where it is, your Honor. We haven't been able through the investigation that has been caused to come on to any clues. We have some, but they are not the type that were admissible in evidence" [p. 1316].



The record of this prosecution is fairly indicative that were there so much as a fresh shoe shine or a newly patched bustle to arouse a suspicion of affluence, the boot-black and the harness maker would have been produced. The defendants were kept under too close surveillance by prying creditors before, as well as officials, after bankruptcy, to have harbored \$32,000.00 without detection. Conversely, there is every reason to believe that in confusion, under pressure and with the savings of a lifetime in jeopardy, they frantically and disorderly liquidated and paid their debts while striving against a black market to obtain lumber as best they could. Debtors so beleaguered and harassed without a very orderly system of bookkeeping in advance may be expected to dissipate assets in striving to turn the current and find themselves without written evidence of their transactions when the storm has swept all away.

Each defendant, as has been indicated, unequivocally denied having any cash at bankruptcy which was not surrendered to the receiver. They explained their receipts and disbursements at length and in detail. Mrs. Noell was cross-examined closely about cash withdrawals by her from the sale of her separate property and which she said was used to buy lumber, pay debts, operating and living expenses. Of course, the cash was not earmarked and she could not generally allocate it in her testimony, but there is no contradiction of her or her husband that it was all spent as of bankruptcy. To bridge this gap in its proof, the Government depends upon an asserted presumption of continued possession, which is unassailing.

For a summary of the evidence, see Fact Brief, Appendix, p. 1, *et seq.*



**Argument.**

(1) Conceding that “this contention calls for an examination of the basic facts as the jury could have found them from the evidence if every conflict in the testimony had been resolved in favor of the appellee” (*Todorow v. U. S.* (9 Cir.), 173 F. 2d 439, 443), there is no substantial evidence to support the essential elements of the crime charged (11 U. S. C., 52 (b)(1)).

(2) Common law rules governing the application and weight attributable to presumptions and other evidence are subordinate to the Supreme Court’s plenary authority to prescribe said matters in the administration of federal jurisprudence (*F. R. Cr. P.*, Rule 26). Referring to *McNabb v. U. S.*, 318 U. S. 332, 87 L. Ed. 819, the same Court observed in *U. S. v. Mitchell*, 322 U. S. 65, 88 L. Ed. 1140:

“The McNabb decision was an exercise of our duty to formulate policy appropriate to criminal trials in the federal courts. We adhere to that decision and to the views on which it was based . . .

“Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge made (citations). Naturally these evidentiary rules have not remained unchanged. They have adapted themselves to progressive notions of relevance in the pursuit of truth, through adversary litigation, and have reflected dominant conceptions of standards appropriate for the effective and civilized administration of law . . . .”

(3) The Bankruptcy Act not only requires the bankrupt to surrender all his assets to the receiver or trustee, but provides a dragnet discovery mechanism (11 U. S. C. A., Secs. 25, 11(a-7), 75(a-1) whence the judicial proc-

ess has evolved a turnover proceeding “by which the Court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity . . .”

“In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account, the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by ‘clear and convincing evidence,’ the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act (citations).

. . .

*“The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding. While some courts have taken the date of bankruptcy as the time to which the inquiry is directed, we do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property and its proceeds have already been dissipated, no matter when that dissipation occurred. Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow . . .”* (*Maggio v. Zeitz* (1948), 333 U. S. 56, 61, 62, 66, 92 L. Ed. 476, 482-3, 485.)

There is a powerful presumption that his official duty was performed by the referee (22 C. J. S. (Evid.), Sec. 589, p. 906; 31 C. J. S. (Evid.), Sec. 146; *Williamson etc. Co. v. London*, 154 Okla. 24, 6 P. 2d 671; *Wheeler-Fisher & Co. v. Comm. Int. Rev.*, 54 F. 2d 294). Since no turn-over order was made for the cash allegedly concealed under Count I, it must be presumed that the referee determined that none was withheld, and so not concealed, by either defendant.

(4) The foregoing presumption adds weight to that of innocence, which prevails until the jury is satisfied beyond a "reasonable doubt" from "substantial evidence" that defendants wilfully concealed their assets.

*Coffin v. U. S.*, 162 U. S. 664, 40 L. Ed. 1109;

*Hersh v. U. S.* (9 Cir.), 68 F. 2d 799, 804;

*Reiner v. U. S.* (9 Cir.), 92 F. 2d 823, 824-5.

(5) There is no evidence that the husband owned or controlled any cash as of bankruptcy, excepting that surrendered to the receiver, or that he aided or abetted his co-defendant wife in concealing any of the proceeds from the sales of her separate property or that she had or concealed the same when the receiver was appointed.

The evidence is clear and uncontradicted that defendant wife invested certain proceeds of sales of her separate property in the partnership for the payment of its debts and the operation of its business. Had any of that money been owned by the partnership as of bankruptcy and not surrendered, both defendants, as partners, may have been liable. If the wife retained any residue which she did not surrender she may have been guilty. But the latter hypothesis admits no guilt in the husband unless he aided and abetted her upon and after the appointment of a receiver.

There is not any iota of evidence that, if the wife withheld any of her separate funds after bankruptcy, the husband had any knowledge thereof or participated therein.

Under the law of California, where defendants resided, "husband and wife may hold property as joint tenants, tenants in common, or as community property." (*Civil Code*, Sec. 161.) Separate property is any property "acquired before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the issues and profits thereof." (*Ibid.*, Secs. 162, 163.) "The wife may, without the consent of her husband, convey her separate property." All other property acquired by either spouse after marriage is community property (*Ibid.*, Sec. 164). "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." (*Ibid.*, Sec. 157.) Husband and wife may contract with each other concerning property as though unmarried, subject to the rules governing persons in a confidential relationship (*Ibid.*, Sec. 158).

By virtue of the latter section, husband and wife may form a partnership and transact business and hold property as such.

*Valensin v. Valensin*, 28 Fed. 599;

*Williams v. Tam*, 131 Cal. 64.

Under the *Uniform Partnership Act* in California (*Civil Code*, Sec. 2395 *et seq.*) "a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership," and whose dominion of such property is limited to partnership uses (*Ibid.*, Sec. 2419), the title to which is in the partnership (*Ibid.*, Sec. 2402).

A husband with authority to sign checks and draw money from a partnership wherein his wife is a member,



does not make him a partner nor interested in her separate property (*Bank & Trust Co. v. Gearhart*, 45 Cal. App. 421, 422). Nor is he liable for her torts.

“For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.” (*Civil Code*, Sec. 171(a).)

Husband and wife were liable for their community debts (*Ibid.*, Secs. 167, 171) and were jointly and severally liable for the partnership debts (*Ibid.*, Sec. 2409). In these circumstances they sought bankruptcy adjudications as individuals and partners and surrendered their assets as such (*Act*, Secs. 4, 5; 11 U. S. C. A., Secs. 22, 23). Each is regarded as a separate entity (*I Remington, Bankr.*, Secs. 45, 67, 73 *et seq.*). A married woman, where a plea of coverture does not avail her, is a separate entity in bankruptcy insofar as her separate estate is concerned.<sup>5</sup>

Nothing in the partnership or husband's petition “concealed” any asset of the wife, who is separately charged in Count II with falsely swearing that she owned no interest in a car. That none of the bankruptcy petitions or schedules are evidence of the concealment of “cash” is demonstrated by the failure of the Government to separately charge husband and wife with false oaths concerning their “cash” disclosures. If the latter findings did not constitute acts of concealment, certainly the husband's petition did not aid and abet the wife to conceal her separate cash.

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<sup>5</sup>*In re Lyons* (Cal. 1874), Fed. Cas. #10,397; *McDonald v. Tefft Weller Co.* (Fla.), 128 Fed. 381; *In re Johnson* (N. Y.), 149 Fed. 864; cf. *In re Dixon* (Mich.), 18 F. 2d 961.



(6) There is no direct evidence that defendants concealed assets. Their convictions under Count I, as to the cash, depends upon the legal sufficiency of circumstantial evidence. The modern mania for words, signs and formulas, in preference to reality, has constrained perceiving courts to test their moorings. The common counterfeit for evidence gains currency from wishful thinking and an abandoned disregard for truth. The fallacy is not novel. To this mesmerism is added the smog from an asserted presumption of continued possession. Lacking evidence of concealment when the trustee qualified, the Government would bridge a gap of months with the presumption that, because the bankrupts were once affluent, they continued so notwithstanding their subjection to the toils of the bankruptcy law.

So careless has been the use of this presumption that its normal restrictions are spurned. As defined in California and elsewhere, it is *disputably* presumed "that a thing once proved to exist continues *as long as is usual with things of that nature*" (C. C. P., Sec. 1963). It is limited to a fact of a "continuous nature" (31 C. J. S. (Evid.), Sec. 124). Accordingly, it is uniformly held that continued solvency or insolvency, or that a bank balance or the value of property, continues to exist. "Human experience," upon which such deductions depend, denies such presumption.

*Scott v. Wood*, 81 Cal. 398, 404-5;

*Coghill v. Boring*, 15 Cal. 213, 219;

*Hugh v. Bank of Commerce*, 103 Cal. 525, 527;

*Estate of Delaney*, 32 Cal. 176;

*Pettit v. Forsyth*, 15 Cal. App. 149;

*Richards v. Dower*, 81 Cal. 44;

*Shaffer v. Noziglia*, 64 Cal. App. 93;

*People v. Caldwell*, 55 Cal. App. 2d 238;

31 C. J. S. (Evid.), Sec. 124, p. 736, *et seq.*, p. 742.

The rule is "limited in its application to such facts and conditions as are of a continuing nature."

22 C. J. S. (Cr. L.), Sec. 588, p. 903;

*Brooks v. U. S.* (8 Cir. 1906), 146 Fed. 223, 229;

*Breitmayer v. U. S.* (6 Cir. 1918), 249 Fed. 929, 934.

There is so much analogy between the fundamental issues involved in an alleged criminal concealment of assets and the violation of a turnover order that what is settled by *Maggio v. Zeits* (1947), 333 U. S. 56, 92 L. Ed. 476, as to the latter is pertinent to the former. Several months before adjudication, the bankrupt in the cited case was proven to have possessed certain assets which the Bankruptcy Court later ordered him to turn over and in default of which he was adjudged in contempt until he complied. There was no evidence in the contempt proceeding to contradict his testimony that he no longer possessed said assets. In reversing the 2nd Circuit (157 F. 2d 951), which had affirmed the turnover order (145 F. 2d 241), the Supreme Court said (92 L. Ed 484-6):

"It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by 'clear and convincing evidence,' *Oriel v. Russell*, 278 U. S. 358, 73 L. ed. 419, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121, and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded

against. It is the burden of the trustee to produce this evidence, however difficult his task may be.

“The trustee usually can show that the missing assets were in the possession or under the control of the bankrupt at the time of bankruptcy. To bring this past possession down to the date involved in the turnover proceedings, the trustee has been allowed the benefit of what is called a presumption that the possession continues until the possessor explains when and how it ceased. This inference, which might be entirely permissible in some cases, seems to have settled into a rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case.

*“However, no such presumption, and no such fiction is created by the bankruptcy statute. None can be found in any decision of this Court dealing with this procedure. Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problems of a particular case, are not rules of law to be applied to all cases, with or without reason.*

“Since no authority imposes upon either the Court of Appeals or the Bankruptcy Court any presumption of law, either conclusive or disputable, which would forbid or dispense with further inquiry or consideration of other evidence and testimony, turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference. Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present con-

trol from proof of previous possession. Such a process, sometimes characterized as a 'presumption of fact,' is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.

"Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another. With what kind of property do we deal? Was it salable or consumable? The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand. Such an inference is one thing when applied to a thrifty person who withdraws his savings account after being involved in an accident, for no apparent purpose except to get it beyond the reach of a tort creditor, see *Rosenblum v. Marinello* (C. C. A. 2d N. Y.) 133 F. 2d 674, 52 Am. Bankr. N. S. 46, it is very different when applied to a stock of wares being sold by a fast-living adventurer using the proceeds to make up the difference between income and outgo.

"Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this Court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed

by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

“We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement.”

In at least two recent cases, this Court has refused to apply said presumption in the absence of other facts warranting an inference of concealment. Other applications are found in the exhaustive annotation in 92 L. Ed. 502.

See:

*Hersh v. U. S.* (9 Cir.), 68 F. 2d 799, 804;

*Reiner v. U. S.* (9 Cir.), 92 F. 2d 823, 824-5.

(7) The *Hersh* case emphasizes, as it did with great elaboration in *Rachmit v. U. S.* (9 Cir. 1930), 43 F. 2d 878, 880. that concealment before the qualification of the receiver or trustee is not interdicted, as does *U. S. v. Yasser* (3 Cir. 1940), 114 F. 2d 558, followed by *U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881, 132 A. L. R. 1157 1161, 1162, which holds that even though the bank-



rupt concealed \$4,000.00 with his wife several months before bankruptcy, this is not evidence of his interest therein at the later critical date. The Court said *inter alia*:

“A man who is not a bankrupt may have buried treasure all over the world. He commits no offense under the Bankruptcy Act. . . .” (1161.)

“Under these circumstances the inference that there was anything left from this \$4,000.00, in Miss Roberts’ hands on April 22, 1937 (bankruptcy) when the money had been turned over in the summer and fall of 1936, *is not one which can be drawn without more proof than the mere turning over of the money.*” (Cit. *U. S. v. Reiner, supra.*)

Accord:

*U. S. v. Tatcher* (3 Cir. 1942), 131 F. 2d 1002.

(8) *Maggio v. Zeitz, supra*, discusses the sufficiency of other evidence to warrant a finding of withholding or concealment, and says (92 L. Ed. 488-90):

“The fact that the contempt proceeding must begin with acceptance of the turnover order does not mean that it must end with it. Maggio makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case. He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings

possessed any real or personal property which could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question.

"It is clear that the District Court in the contempt proceeding attached little or no significance to Maggio's evidence or testimony, although the Court gave no indication that the evidence was incredible. The District Court in its opinion cites only *Re Siegler* (C. C. A. 2d N. Y.), 31 F. 2d 972, 14 Am. Bankr. N. S. 15, in which the Court of Appeals reversed a District Judge who, because he believed the bankrupt's testimony, had refused to commit him for contempt. The Siegler case and other cases decided by the Court of Appeals apparently led the District Judge to conclude that no decision other than commitment of Maggio would be approved by that court.

"Nor did the Court of Appeals, reject this view. Indeed it affirmed the commitment for contempt because it considered either that present inability to comply is of no relevance or that there is an irrebuttable presumption of continuing ability to comply even if the record establishes present inability in fact. It seems to be the view that this presumption stands indefinitely, if not permanently, and can be overcome by the accused only when he affirmatively shows some disposition of the property by him subsequent to the turnover proceedings. We do not believe these views are required by *Oriel v. Russell*, 278 U. S. 358, 73 L. Ed. 419, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121, despite some conflicting statements in the opinion,

which the Court of Appeals construed as compelling affirmance of the contempt decree.

“This Court said in the *Oriel* case that a ‘motion to commit the bankrupt for failure to obey an order of the Court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty.’ 278 U. S. 358 at 363, 73 L. ed. 419, 424, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121.

“Of course, to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the bankrupt estate. That this Court in the *Oriel* case contemplated no such result appears from language which it borrowed from a Circuit Court of opinion, which, after pointing out that confinement often failed to produce the money or goods, said, ‘Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt’s inability to obey the order, he has always been released, and I need hardly say that he would always have the right

to be released, as soon as the fact becomes clear that he cannot obey.' Moreover, the authorities relied upon in Chief Justice Taft's opinion make it clear that his decision did not contemplate that a coercive contempt order should issue when it appears that there is at that time no wilful disobedience but only an incapacity to comply. Indeed, the quotation from *Re Epstein*, cited *supra* (note 4), also stated at p. 569: 'In the pending case, or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or goods, and in that event the civil inquiry is at an end.'

Again (92 L. Ed. 490-1):

"Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context.

"But the bankrupt may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. . . ."

It was held in *Hersh v. U. S.* (9 Cir.), 68 F. 2d 799, 804:

"The burden of proof was upon the government to show the concealment of the funds alleged in the indictment. In view of the fact that the concealment relied upon consisted in the transfer of moneys to Klein and Auerbach several months before the trus-

tee qualified, it was essential to show that this concealment continued down to the time the trustee was appointed and thereafter, with intent to deprive the trustee and the creditors of the aforementioned sum.”

The foregoing is quoted by this Court in *Reiner v. U. S.* (9 Cir.), 92 F. 2d 823, 825, where the bankrupt did not expressly account for a substantial sum, but it was held:

“There is *no evidence that this was not* expended in necessary living expenses between April 24th and July 7th. The appellee failed to maintain its burden of proof that there was any of it left to conceal on July 7th.”

Certain it is that where circumstantial evidence is relied upon to prove concealment, it must establish more than suspicion and is insufficient unless inconsistent with defendants’ innocence. The case at bar is within the condemnation of *U. S. v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707, where it was held:

“They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain.”

Reversing a conviction, *Wesson v. U. S.* (8 Cir., 1949), 172 F. 2d 931, 933-5, held:

“Before considering the nature of the circumstances relied upon it is well to have in mind the rule of law



relative to the probative force of such evidence. Even in a conspiracy case, which is ordinarily not susceptible of proof by direct evidence, facts and circumstances to sustain a verdict must be such as legitimately tend to sustain an inference. Inferences must be based upon proven fact or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. *Adair v. Reorganization Investment Co.*, 8 Cir., 125 F. 2d 901; *Southern R. Co. v. Stewart*, 8 Cir., 120 F. 2d 85; *Hoskins v. United States*, 8 Cir., 120 F. 2d 464; *Massachusetts Protective Assn. v. Moubert*, 8 Cir., 110 F. 2d 203. In *Read v. United States*, 8 Cir., 42 F. 2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well settled in this circuit.' In *Salinger v. United States*, 8 Cir., 23 F. 2d 48, 52, this court said: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused.' "

III.

**There Is No Evidence to Support the Implied Finding That Defendant, Amelia E. Noell, Concealed the Automobile as Alleged in Count I. (Points on Appeal, 1, 2, 4, 5, 6, 7.)**

*Foreword.* Point IV, *post*, presents the insufficiency of the evidence to show that the husband concealed the car alleged in Count I; Points V and VI, *post*, the insufficiency of the evidence to show the wife's and husband's false oaths, respectively, concerning the same car, as alleged in Counts II and III. All of the testimony and exhibits pertinent to said subjects with transcript references are narrated in the Fact Brief (Appendix p. 10, *et seq.*, *post*); as the same is interrelated as to each count, it is hoped to serve the presentation of each of said contentions, avoid repetition, and conserve space with one summary of the facts at this place.

*Discussion of Evidence.* Defendant wife owned the Chevrolet as her sole and separate property, together with several parcels of realty hereinbefore referred to. Defendants' business partnership was so involved by May 13, 1946, that the wife had not only liquidated her realty to pay debts and living expenses, but on that date the partnership business was attached and on May 22nd next the bankruptcy petitions were filed.

Defendants knew John and Lena Buscemi *et ux.* from their partnership's sale of lumber to the latter, who purchased a carload as late as May 1, 1946. Mr. Noell was supervising the building of their house and thereafter assisted him in the taxi and chicken business. Before

May 9th, Buscemi operated a taxi cab, Chrysler and Buick, in his taxi business at Rosemead. On the latter date he wanted to buy defendant wife's Chevrolet for the ceiling price and they (defendants and John Buscemi) rode in Buscemi's Chrysler to his lawyer's (Macbeth) office in Los Angeles, where the ceiling was ascertained to be \$846.00. At the request of Buscemi, who does not write or read English, Mrs. Noell filled out his check in that amount, which he then signed and delivered to her concurrently with their signing the pink slip and registration, which she delivered to him. They then returned to defendants' home in Monrovia, where the latter delivered two sets of keys for the Chevrolet to Buscemi, who drove it away. May 13, 1946, Mrs. Noell cashed the check. About that time Mrs. Buscemi inquired of an employee, Stroh, how to have the car transferred into their names and he told her.

In June, 1946, the Chevrolet was in an accident while driven by one Stroh, then employed by Buscemi, and towed to the Uplands Garage for repairs. Buscemi, Stroh, Noell, and a third party, who was not a witness, went to the police department where an accident report was filed. Buscemi had insured the car and at his request Stroh presented a claim to the insurance carrier. Buscemi, then about to leave for the East, signed a check in blank for Noell to pay the repair bill when ascertained and a written authorization for Noell to pick up the car and use it, which he did. Upon his return from the East, Buscemi received and retained all the proceeds from his insurance claim.

In November, 1946, Buscemi had the car repainted, installed five new tires, and held it "for sale" at \$1,500.00. While Noell was driving it, Mr. Palm negotiated with Buscemi for its sale for \$1,425.00. Those three went to the bank where Buscemi executed and delivered his pink slip and bill of sale for and delivered the car to Palm upon the latter paying him \$1,425.00 in cash with bills for \$1,000.00, four \$1.00 and \$25.00. Palm had the title transferred into his name and is the last person seen with the car in this case.

Each defendant testified that all their property was surrendered to the receiver.

The foregoing summary is supported by the official records which plaintiff sought to impeach by John and Lena Buscemi, who testified to the same effect in the Bankruptcy Court in June, 1946, until F. B. I. accountant Kirk discussed the matter with them 100 times. However, when the Buscemis' contradictions and self-confessed perjury is scrutinized independently of their conclusions and with the presumption of innocence, there really is no substantial conflict as to essentials that are relevant to the alleged concealment of the car and the false oath of defendants concerning the same.

John Buscemi testified that upon leaving the lawyer's office, Mrs. Noell lamented her lack of a car, that he told her she could have it back. Of course, she then had his check, he had the pink slip, and nothing was to prevent their concealing the transfer but their lack of accord. There is no pretense that they agreed upon the terms of



a re-sale or that Buscemi ever executed a transfer of his pink slip until his sale to Palm six months later. Mr. and Mrs. Buscemi each testified to their purchase and ownership of the car in the Bankruptcy Court until Mr. Kirk took them in hand. Conversely, defendants testified that upon delivering the car to Buscemi he did tell Mrs. Noell that she could use any of his cars or taxis, when needed, and they in fact did so.

John Buscemi further testified that three days after the sale defendant husband handed him an envelope containing what he believed was currency. Mr. Noell did not say what the envelope was for, nor was there any transfer of title or possession of the car.

These incredible fantasies were followed by Buscemi's collection and retention of the insurance and the sale of the car to Palm, of which latter he added in contradiction of Palm and Noell that upon receipt of the \$1,425.00 he and Noell went behind the bank where he gave Noell the money and the latter loaned him \$1,000.00, which he deposited in the Rosemead bank and which those bank records denied. He said that two months later he repaid Noell by cashing a check for \$1,000.00 and giving Noell the difference between what Buscemi owed him for the loan (\$1,000.00) and what Buscemi owed him for materials for Buscemi's house! If figures don't lie, neither do liars always figure what they are saying. According to Mr. Buscemi, "payment" is like reducing an over-draft by drawing more checks against it. He and his wife admit testifying in the Bankruptcy Court that John Buscemi received and kept all of the \$1,425.00 from the sale to Palm.



**Argument.**

From the foregoing, these conclusions seem inescapable:

- (1) There was no agreement for nor any transfer of any interest in the car by Buscemi to Mrs. Noell after the sale.
- (2) Mrs. Noell did not participate in or authorize any transaction concerning the car after the sale other than as she used it intermittently with Buscemi's permission.
- (3) There is no evidence that, if Mr. Noell handed Buscemi \$846.00 three days after the sale, Mrs. Noell had any pact therein or that the money was paid for an interest in the car for either defendant.
- (4) Buscemi had and retained absolute ownership and possession of the car until the Palm sale and defendants' intermittent use was that of gratuitous borrowers and bailees.

The foregoing, with applicable amplification, is also the basis for appellants' contentions under Points IV, V, and VI, *post*.

**Authorities.**

(1) Buscemi's testimony concerning his arrangement with Mrs. Noell and receipt of money from Mr. Noell, without indication of its amount or purpose, is inherently preposterous and incredible and insufficient to support a finding (*Neblett v. Elliott*, 46 Cal. App. 2d 294).

(2) Whether or not defendant wife retained or received any interest in the car is governed by local law (*Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188).

(3) Defendant wife's contract with Buscemi was for the immediate transfer of her car to him for the payment of the agreed price. It was completely executed with reciprocal delivery of property and price and thus a sale (*Cal. Civ. Code*, Secs. 1721, 1796, 1729, 1738, 1739 (Rule 1), 1761, 1762). It was also sanctified by defendant's transfer to Buscemi of the "pink slip," or certificate of ownership, the indicia of title, and the issue of a new certificate to him, under California Vehicle Code, Secs. 175-186; *Rosenberg v. Beales*, 56 Cal. App. 212.

In contrast with the uncorroborated testimony of perjurer Buscemi, that he thereafter told defendant she could have the car, the foregoing entitled defendant to an instruction that an absolute sale was presumed and must be so found in the absence of substantial evidence to the contrary.<sup>7</sup>

(4) Since there is no evidence of a contract for defendant's retention of an interest in the car (*Civil Code*, Sec. 1726), she could only have been invested therewith by a subsequent contract to sell from Buscemi (*Ibid.* 1721) which necessitated a meeting of minds upon subject matter, price and terms (*Ibid.*, Secs. 1550, 1723, 1729, 1738, 1761-3, 1796). There is no evidence of such contract.<sup>8</sup>

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<sup>7</sup>*Chadowski v. U. S.* (Ill. 1912), 194 Fed. 858.

<sup>8</sup>*McClintock v. Robinson*, 18 Cal. App. 2d 577, 582; *Chas. Brown & Sons v. White Lunch Co.*, 92 Cal. App. 457; *Jules Levy & Bros. v. Mautz & Co.*, 16 Cal. App. 606; *Rest. (Contracts)*, Sec. 32.

(5) In the absence of delivery, part payment or a written memorandum of such contract under the Statute of Frauds (*Civ. Code*, Sec. 1724), such contract is unenforceable. Secs. 2981, 2982, *Civil Code*, were added in 1945 to prescribe the formalities for a contract for the conditional sale of a motor vehicle, whose violation renders the same "unenforceable," except by "a purchaser for value."<sup>9</sup>

(6) A purported sale made without delivery of the certificate is unlawful and ineffective to pass title,<sup>10</sup> except by estoppel which at least requires a change of possession.<sup>11</sup>

On appeal oral testimony "in conflict with contemporaneous documents" is given "little weight, particularly when the crucial issues involve mixed questions of law and fact" (*U. S. v. U. S. Gypsum Co.* (1947), 333 U. S. 364, 396, 92 L. Ed. 746, 766).

(7) Defendant wife did not receive from Buscemi a gift of the car nor of any interest therein which, besides the registration requirements, "is not valid, unless the means of obtaining permission and control of the thing are given, nor, if it is capable of delivery, unless there

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<sup>9</sup>*Carter v. Seaboard Finance Co.*, 85 A. C. A. 773, 193 P. 2d 985.

<sup>10</sup>*Vehicle Code*, Secs. 176, 186; *Ludwig v. Steger*, 99 Cal. App. 235; *San Joaquin, etc. Co. v. Prather*, 123 Cal. App. 379; *Sly v. American Ind. Co.*, 127 Cal. App. 202; *Coca-Cola B. Co. v. Feliciano*, 32 Cal. App. 2d 351.

<sup>11</sup>*Civil Code*, Secs. 1743(1), 3543; *Kenny v. Christianson*, 200 Cal. 419; *Dennis v. Bank of America*, 34 Cal. App. 2d 618; *LeGrand v. Russell*, 52 Cal. App. 2d 279.

is an actual or symbolical delivery of the thing to the donee (*Civ. Code*, Sec. 1147). A mere promise to make a gift is *nudum factum* and unenforceable.<sup>12</sup> "An uncompleted attempt to make a gift in trust" vested "no right in the donee" (*Holbrook v. Smith* (1948), 87 A. C. A. 81, 88).

(8) If, despite the foregoing, it should be assumed that defendant wife retained or received some secret interest in the car in the Buscemi transaction, on May 9, 1946, there is no evidence that she held such or any interest therein after he sold and delivered possession of the car to a third party in November, 1946; and thus no evidence that she "concealed" said property from the receiver or trustee.<sup>13</sup>

(9) It follows that, although a false bankruptcy schedule, as alleged in Count II, may be an act of concealment,<sup>14</sup> defendant wife's schedules were true as to her non-interest in the car when she became a bankrupt (Point II, *post*), and did not conceal an interest which she did not own.<sup>15</sup>

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<sup>12</sup>*Gordon v. Barr*, 13 Cal. 2d 596, 601; *Barham v. Khoury*, 78 A. C. A. 225, 230-1; *Foltz v. First T. & S. Bank*, 86 A. C. A. 63, 65.

<sup>13</sup>*Accord: U. S. v. Hersh*, 68 F. 2d 799, 804; *U. S. v. Yasser* (3 Cir. 1940), 144 F. 2d 558; *U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881; *U. S. v. Tatcher* (3 Cir. 1942), 131 F. 2d 1002.

<sup>14</sup>*Duggins v. Heffron* (9 Cir. 1942), 128 F. 2d 546; *Goetz v. U. S.* (Ill.), 59 F. 2d 511; *U. S. v. Shapiro* (Wis.), 101 F. 2d 375; *Coghlan v. U. S.* (N. D. 1945), 147 F. 2d 233 (cert. denied, 325 U. S. 888).

<sup>15</sup>*U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881, 132 A. L. R. 1157.

IV.

**There Is No Evidence to Support the Finding That Defendant Husband Concealed an Automobile as Alleged in Count I.** (Points on Appeal, 1, 2, 4, 5, 6, 7.)

**Argument.**

There is no evidence of any title to the car in Mr. Noell at any time and plaintiff's theory throughout, as expressed in Counts II and III, has been that the wife retained ownership or an interest after the sale to Buscemi. Certainly there is no evidence of any contract for the husband to buy the car. Buscemi does not assert that, when he says Mr. Noell handed him an envelope of cash, there was any application of the same or even a purpose expressed as to its use or any arrangement for the sale of the car. And certainly there was no recorded transfer of the car to the husband nor credible evidence that he ever acquired any interest therein.

If he could not have concealed it as his own asset, wherein did he aid and abet his wife after bankruptcy. His schedules and those of the partnership (privileged in any event) properly omitted reference to property which neither owned and was not interested in. His examination by the Bankruptcy Court is privileged. When he drove the car after bankruptcy, he used it either for himself or in Buscemi's business. When he assisted Buscemi collect his insurance claim and sell the car, he was not concealing anything for his wife.

**Authorities.**

(1) *Nyc & Nisson v. U. S.* (Adv. Op. 1949), 93 L. Ed. 752, 756, 757, describes aiding and abetting as follows:



“In order to aid and abet another to commit a crime, it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’ (L. Hand, J., in *U. S. v. Pconi* (C. C. A. 2 N. Y.), 100 F. (2d) 401, 402).”

“ . . . It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy . . . Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing . . . ”

Defendant husband did not aid or abet a concealment by his wife.<sup>16</sup>

(2) The truth and immateriality of this testimony alleged as a false oath under Count III is discussed in Point VI, *post*.

(3) Defendant's testimony (Count III) in his examination under 11 *U. S. C. A.*, Sec. 25(a-10) is inadmissible “in evidence against him *in any criminal proceeding*, except such testimony as may be given by him in the hearing upon objections to his discharge: . . . ;” and excepting a prosecution for perjury in such testimony (*Cameron v. U. S.*, 231 *U. S.* 710, 58 L. Ed. 448). Therefore, said testimony is incompetent under Count I to prove that defendant concealed or aided and abetted his wife in concealing the car sold to Buscemi.<sup>17</sup>

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<sup>16</sup>*U. S. v. Yasser* (N. J. 1940), 114 F. 2d 558.

<sup>17</sup>11 *U. S. C. A.*, Sec. 25(a-10), Notes 61-73; *White v. U. S.* (Mass. 1929), 30 F. 2d 590; *Aronofsky v. Boston* (Mo.), 133 F. 2d 290; *Bain v. U. S.* (Tenn. 1920), 262 Fed. 664; *In re Haley* (D. C. Cal.), 41 F. 2d 379; *U. S. v. Salih* (Mass.), 287 Fed. 763.

V.

**There Is No Evidence to Support the Implied Finding of "Guilt" Under Count II That Defendant Wife Falsely Swore That She Owned No Interest in the Car in Her Bankruptcy Schedules "F" and "G". (Points on Appeal, 1, 5, 6, 7, 8.)**

Count II of the indictment is not predicated upon defendant wife's ownership, but her "interest" in the car as of the filing of her schedules [Tr. 4] and it is not contended that she did not disclaim such interest in said schedules [Pltf. Ex. 4].

(1) From what has been said in Point III, *ante*, it would seem irrefutable that, as of bankruptcy, her sworn disavowal of ownership or interest was true.

(2) It need hardly be added that were there some secret investment of an interest in her in her sale to Buscemi, certainly his subsequent bona fide sale to a third party would estop her from asserting such claim (Point II (4) *ante*). But were there a doubt as to such estoppel, her appraisal thereof could not be better than a speculative "opinion" which, though erroneous, is not the subject of perjury<sup>18</sup> nor the evidence of *scienter* essential to the crime.<sup>19</sup>

(3) This criminal statute as to false oath creates no new crime, but merely a different penalty for perjury in bankruptcy matters<sup>20</sup> and requires the corroboration of one witness or additional evidence.<sup>21</sup>

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<sup>18</sup>*U. S. v. Margolis* (N. J. 1943), 138 F. 2d 1002; *In re Shoemaker* (D. C. Ind., 1868), F. C. #12799 (doubtful title); Point VI, N. 26, *post*.

<sup>19</sup>*Morris Plan Inv. Bank v. Henderson* (N. Y.), 131 F. 2d 975; *In re Peters* (N. Y.), 39 Fed. Supp. 38.

<sup>20</sup>*U. S. C.*, Sec. 52(b-2); *F. R. Cr. P.*, Rule 26; *Wechsler v. U. S.* (N. Y. 1907), 158 Fed. 579; *Hammer v. U. S.* (N. Y. 1925), 6 F. 2d 786.

<sup>21</sup>*18 U. S. C.*, Sec. 1621; *Khin v. U. S.* (N. J. 1931), 47 F. 2d 740; *U. S. v. Margolis*, *supra*.

VI.

- (1) Count III Does Not Allege a False Oath; and
- (2) The Testimony of Defendant, James A. Noell, in the Bankruptcy Court Respecting the Chevrolet Automobile Was Not Proven to Be False. (Points on Appeal, 7, 9.)

(1)

*Insufficiency of Count III; Plain error unassigned.*

Count III does not allege any testimony by the defendant in the Bankruptcy Court that constitutes the false oath charged, namely, that he gave the alleged testimony knowing that his wife "did have an interest in said 1941 Chevrolet Tudor Sedan automobile, and had not made a bona fide sale thereof to John Buscemi" [Tr. 7-8]. The indictment recites that he testified that "the car was sold to John Buscemi"; that it was owned by his wife and "clear" when sold for \$800.00 odd; that he does not know but presumes that Buscemi, the owner, should have the pink slip; that defendant had the car in his possession about a week ago but "it was Mr. Buscemi's car. I had borrowed it from him. The title had been transferred and everything *so far as I know.*" The indictment shows that this testimony was all given at a hearing held on June 3, 1946, and from the page references quoted, it was apparently given at one sitting [Tr. 6-8].

*There is a substantial variance in the testimony ascribed to defendant in Count III, as compared with the stenographic notes of the phonographic reporter read at the trial [R. T. (I) p. 54, line 17, to p. 60, line 14]. The last quotation in the indictment from the purported testimony in the Bankruptcy Court reads:*

"Q. (By Referee Brink.) All right, when was the last time you had the Chevrolet in your possession or when was the last time it was in Mrs. Noell's pos-

session? A. (By Defendant James A. Noell.) It was in my possession about a week ago. But it was Mr. Buscemi's car. I had borrowed it from him. *The title had been transferred and everything so far as I know.*" [Tr. 7.]

As read by the reporter the italicized "or" was erroneously included and a comma in its stead omitted in the referee's question [R. T. 60:8-10]. On cross-examination [R. T. 60] he reiterated [60:13] that the answer was also misquoted [61:14-62:5]. The reporter's notes read:

"Answer (By Mr. Noell). It was in my possession about a week ago. But it was Mr. Buscemi's car *then*. I had borrowed it from him, had the title transferred and everything so far as I know." [60:8-14; 61:12-62:5.]

Defendant was not asked if his wife had an interest in the car nor did he testify that she did not. It is not (and upon the record cannot be) claimed that, insofar as defendant knew, Buscemi did not receive the pink slip which is the indicia of title (Point III (p. 40), *ante*).

It is not alleged that title was not transferred "as far as I know," nor that defendant did not borrow the car from Buscemi.

(a) The charge is a *non sequitur*. His alleged knowledge that his wife had an interest in the car does not falsify his oath that Buscemi owned it, which is recognized under California Vehicle Code.<sup>22</sup>

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<sup>22</sup>*California Vehicle Code*, Sec. 186; *Civil Code*, Sec. 2981(2); *George v. Barnett*, 65 Cal. App. 2d 828; *LeGrand v. Russell*, 52 Cal. App. 2d 279; *Helmuth v. Frame*, 46 Cal. App. 2d 372; *Coca-Cola Bottling Co. v. Feliciano*, 32 Cal. App. 2d 351; *Bunch v. Kin*, 2 Cal. App. 2d 81; *U. S. v. Schireson* (3 Cir.), 116 F. 2d 881; *Point III* (5), *ante*.

An oath is not false under 11 U. S. C. A., Sec. 52(b) if the challenged testimony may be true or false.<sup>23</sup>

(b) Nor if qualified, as here, by the reservation "as far as I know," unless the latter is allegedly false.<sup>24</sup>

(c) Nor where the witness' entire testimony on the subject when construed together, as it fairly must be,<sup>25</sup> amounts to a mere opinion or conclusion.<sup>26</sup> As said in 41 *Am. Jur.* (Perjury), Sec. 6, p. 6:

"It cannot be based on interpretations of alleged agreements, either oral or written, or upon opinions calling for the exercise of judgment, or upon statements as to the legal effect of certain facts. Hence, where a statement which is made the basis of an accusation of perjury is a matter of construction or deduction from given facts, there is no perjury even though the statement is erroneous or is not a correct construction or logical deduction from all the facts."

## (2)

(a) The only evidence claimed to show the wife's interest is perjurer Buscemi's contradicted statement after the sale, that she could have the car if and when she wanted it. Were that a binding offer, and it is not, the wife never accepted it.

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<sup>23</sup>*People v. Woodcock*, 52 Cal. App. 412.

<sup>24</sup>*Morris Plan Inv. Bank v. Henderson* (N. Y.), 13 F. 2d 975; *In re Peters* (N. Y.), 39 Fed. Supp. 38.

<sup>25</sup>*U. S. v. Norris* (1936), 300 U. S. 564, 573, 81 L. Ed. 808, 813; *People v. Gillette*, 111 N. Y. Supp. 133; *Loubricel v. U. S.* (2 Cir. 1926), 9 F. 2d 807-8; *dstg. Ono v. Carr* (9 Cir.), 56 F. 2d 772, 774; *People v. Markham*, 206 N. Y. Supp. 197; *cf. Seymour v. U. S.* (8 Cir.), 77 F. 2d 577, 582.

<sup>26</sup>*Ex parte Ellis*, 3 Okla. Cr. R. 220, 105 Pac. 184, 25 L. R. A. (N. S.) 653; A. C. 1912-A, 863; *Schoenfelt v. State*, 56 Tex. Cr. R. 103, 119 S. W. 101, 22 L. R. A. (N. S.) 1216 (Note), 133 A. S. R. 956; *Lambert v. People*, 76 N. Y. 220, 32 A. R. 293; *cf. U. S. v. Margolis* (N. J.), 138 F. 2d 1002.



What has already been argued against either defendant's alleged concealment of the car under Count I (Points III, IV, *ante*), and against the wife's false oath in her schedule under Count II (Point V, *ante*), supports this defendant's contention that his oath was not false under Count III and needs no repetition. If his wife did not have a secret interest in the car, as of bankruptcy, after her sale to Buscemi, defendant did not falsify.

If she did have some unenforceable right or hope of reacquiring the car, his testimony that Buscemi owned the car would not be false because he did not volunteer what he was not asked.

No evidence in the case is material that is not within the calls of Count III, which specifically limits the issue to false testimony concerning *the wife's car*, not the husband's. As heretofore noted, the wife had no participation in anything concerning the car after the sale when Buscemi claims to have offered it back to him, and she did not accept it.

Perjurer Buscemi testified that, 3 days after his purchase, the husband brought an envelope to him, the contents of which he did not examine, and that the car was thereafter used in the former's taxi business by the husband and kept at the buyer's stand. There is no evidence that this was the wife's money, paid at her instance, nor that she was interested in Buscemi's taxi business or that the alleged money was delivered to Buscemi to repurchase the car.

It ought also be remembered that the evidence of the husband's use and activities concerning the car with Buscemi's permission after the former had given the interdicted testimony on June 3, 1946 [Tr. 6, 7], is not shown to have been authorized or participated in by de-

fendant wife. It is axiomatic that one person's rights cannot be disparaged, nor liabilities imputed to her by the conduct of another in the absence of agency. While her acts of ownership and possession after the alleged sale might raise a presumption against the latter, certainly the husband's independent conduct would not evidence the ultimate issue, namely, her interest, if any.

(b) The only corroboration concerning perjurer Buscemi's self-asserted statement to defendant wife is its inherent improbability and manifest falsity. At a time when cars of any vintage were at a high premium, it would hardly be expected that, after executing and completing a sale under a lawyer's guidance, and complying with the transfer requirements of the Vehicle Code, the buyer would immediately respond to the wife's lamentation over her lack of a car with any binding promise to restore his purchase. But whatever the probabilities, there is nothing in the alleged conversation which rises to the dignity of any contract whatever, independently of the formalities prescribed by the Statute of Frauds and Vehicle Code. There was no gift nor meeting of minds upon the terms of a re-sale.

This case demonstrates the wisdom of the rule requiring corroboration of a perjury charge.<sup>27</sup> It derives from the experience of ancients who ordained in the *Mosaic Code* a "diligent inquisition" and that not one, but three, witnesses were essential to establish a criminal charge.<sup>28</sup> "One witness shall not rise up against a man for any

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<sup>27</sup>18 U. S. C. 1621; 41 Am. Jur. 37; *Khin v. U. S.* (N. J.), 47 F. 2d 740; *U. S. v. Margolis* (N. J.), 138 F. 2d 1002.

<sup>28</sup>*Deut.* 17:6; *Heb.* 10:28; 2 *Cor.* 13:1; *Clark's Biblical Law*, Sec. 470.

iniquity or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." (*Deut.* 19:15.)

There certainly is no corroboration of perjurer Buscemi's testimony in the Department of Vehicle records of the sale to him and by him to Palm, nor in the open, notorious, continued possession, expensive repairs, painting and other acts of ownership by each buyer while he held title. Nor in Buscemi's receipt of damages for injuries to his car and the purchase money from Palm.

The circumstance that, having done work for and then working for perjurer Buscemi, and apparently being on friendly terms, the husband should have used the car intermittently, either about his work or for his personal needs, is of no significance whatever and is in any event irrelevant to any secret "interest" in the wife. The relationship of the two families at that time made such arrangement perfectly natural when the husband lacked and needed transportation.

In closing this subject, it should be added that the padding of an indictment with such baseless charges as those precipitated in Counts II and III penetrates the camouflage of mathematical smog and sound effect employed to simulate the equally groundless Count I. Aside from the hope that much artificial smoke will force several convictions whence the prosecutors can send a more lucious offering to the wardens, while preserving a double sentence in the form of a probationary term, there is first and primarily exposed in such dragnet practice the tactics of mesmerizing the jury with the heresy that faithful public servants would not give currency to any charge were it unjustified by the mysterious laboratory tests of bureaucratic omniscience. Once this heresy termites

mental integrity, a jury's susceptibility to more of the same stimulant is increased with each additional false count. It is the same vicious practice indulged to the low plane of pettifoggery in universal conspiracy charges which has again invited the rebuke of the Supreme Court (*Krulewitch v. U. S.* (1949), Adv. Op. 93 L. Ed. 623, 627). Justice, as of old, demands a more "diligent inquisition."

## VII.

**It Was Prejudicial Error for the Court (1) to Permit Witness Kirk to Expose to the View of the Jury the Enlarged Charts of His Summary of Defendants' Accounts and His Opinions, Until Said Charts Were Received in Evidence; and (2) in Denying Defendants' Motion to Strike the Summary of Said Witness as Admittedly Incomplete and Inaccurate; and (3) in Admitting Said Charts in Evidence.** (Points on Appeal, 10, 15.)

### Statement of Record.

From the preceding Statement of Facts (Appendix, p. 1, *et seq.*), and Point I, *ante*, it appears that the jury were denied knowledge of the voluminous documentary evidence which plaintiff relied upon in an attempt to show that the difference between the cash income and outlays of defendants resulted in a substantial balance, which they had not surrendered to the receiver. F. B. I. accountant Kirk was permitted to expound his summary of such parts of said evidence as he deemed pertinent and to advertise to the jury before his summary was received three large charts depicting his handiwork. Plaintiff's Exhibit "40" for Identification (never received in evidence) is a summary of the bankruptcy schedules [Exs. 4, 4-A, 4-B, 4-C, 4-D] which are inadmissible in evidence [R. T. 163-6].



Plaintiff's Exhibit "57" is an alleged summary of the partnership business [R. T. 291-5]. Plaintiff's Exhibit "58" is an alleged summary of cash receipts by partnership and defendants, disbursements and balances [R. T. 296-7]. Over defendants' objection, the Court directed the bailiff to "provide an easel or some mechanism upon which it can be arranged so all of us can see it." When the props were set and visibility tests made, Mr. Kirk occupied the stage for several days [R. T. 293].

Appellants do not content that it is improper to use the evidence of an expert to summarize *all* the items of such accounts and state the results of the jury, nor to thereafter illustrate the same by the use of charts. If plaintiff had confined itself to that course in this case, there would have been no objection. Of course, before such expedients can be resorted to in any case, the proper foundation must be laid by the introduction of competent evidence that is material or relevant to the issue.<sup>1</sup> The jury, who were not bound by the conclusions and opinions of an expert, were obliged to weigh such foundational evidence and reach their own conclusions.<sup>2</sup>

In this case, the exact reverse of the proper procedure occurred. Not only were the jury ignorant of the foundational evidence (*Point I, ante*), but before the qualifications and competency of witness Kirk were established by way of showing his familiarity with the accounts of defendants, he was permitted, over defendants' objections, to attach said charts to the blackboard and expose

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<sup>1</sup>*Stephens v. U. S.* (9 Cir.), 41 F. 2d 440; *U. S. v. Weinbren* (2 Cir.), 121 F. 2d 826; Note 6, *post*.

<sup>2</sup>*F. R. Cr. P.*, Rule 28; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028; *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937; *McGowan P. T. B. Co. v. Amession*, 121 U. S. 585, 30 L. Ed. 1027.



the same to the jury, where they remained throughout his testimony and the trial and during recesses for the edification of prowling curiosity [Pltf. Exs. 40, 57, 58, R. T. 282-95; 297-6, 708, 729-732].

It will be recalled from *Point II, ante*, that defendants, husband and wife, comprised a business partnership whose assets consisted of defendants' community property and certain cash advances from the sale of her separate real estate by defendant wife to buy materials and supplies and pay operating expenses and debts. It does not appear that defendant husband owned any separate estate.

The partnership commenced in October, 1945, and ceased operations about May 22, 1946. Its records consisted of ledger, journal, cash book, check books, files and numerous memoranda of refunds to purchasers of houses whose orders could not be filled because of the lumber shortage. None of these books were posted to May 22, 1946, and in several instances not for several months before bankruptcy. No lumber purchases were entered after March 27th and no sales after February 28th, though there is other evidence thereof. The last cash receipt entry is April 17th [R. T. 249-50, 745-58, 791].

The partnership was insolvent from March, 1946, except for the cash advances by Mrs. Noell from the sale of her separate real estate. There were no books of account introduced concerning her separate estate and the information about said sales and advances was derived from escrows, bank records and the partnership books.

Witness Kirk had access to the account of assets [R. T. 173] and business records [R. T. 182] surrendered to

the bankruptcy receiver by defendants. After relating his examinations of the foregoing, which he assertedly summarized upon said sheets [Exs. 40, 57, 58], he admitted that, in charging defendants *jointly* with \$32,011.67 as unaccounted for, he lumped all income of the partnership and of each individual defendant regardless of its partnership, community or separate property character [*Point II, ante*; R. T. 263, 733-64, 769].

He admitted that his summary charts and opinions were confined to said incomplete records and excluded other large financial transactions of which he was informed before testifying [R. T. 162-5, 193, 203, 219, 237-49, 252-323, 659-764, 769-899]. He was permitted to charge defendants personally with all cash withdrawals for which he could not find a book entry that satisfied him otherwise, and the chart, Exhibit 57, was so prepared [R. T. 264-74, 282-95, 312, 664-9].

Thus, Exhibit 57 charges defendants jointly with the receipt of \$16,636.58 from the sales of Mrs. Noell's separate property [R. T. 888-9] to make up the total of \$32,011.67 which the witness was permitted to opine *they* had not accounted for (and, therefore, concealed from the receiver several months later!). Deduct her separate receipts from said balance and the remainder chargeable to both defendants is \$15,385.09. But that is not all.

In the bankruptcy schedules [Ex. 4] the partnership listed \$15,000.00 as owing from Schueles for undelivered lumber for which they had deposited said sum with him. Expert Kirk admitted that he erred in charging

that item to defendants as receipts unaccounted for [R. T. 865-72]. Deduct that from the preceding balance of \$15,375.09, and the remainder is \$375.09.

Regarding Count I as a joint charge of concealment of funds, the foregoing trifle is immaterial and irrelevant when it is considered that defendants had to live for several months.

But appellants are here challenging the admissibility of expert evidence; return to the Schueles mistake of \$15,000.00 and deducting it from the \$32,011.67, find a balance of \$17,011.67, which the expert says was unaccounted for. However, he therein charged as receipts unaccounted for the proceeds of checks, cashed by one or the other defendants *individually*, bearing notations “for lumber,” “lumber yard,” etc., for \$4,000.00, \$2,500.00, \$1,500.00, or \$8,000.00, leaving a balance of \$9,011.67. The balance is comprised of cash withdrawals by one or the other defendant with no notation on the check indicating its purpose [R. T. 872-87]. However, the partnership was doing business, buying materials and making refunds during all that period, as shown in *Point II, ante*.

Despite these foundational errors and deficiencies, the expert was permitted to reflect the same in his opinion as cash unaccounted for by defendants (jointly) and to embalm his fallacies in the jury’s mind with the charts and scrolls. The jury did not comprehend the voluminous exhibits without which the passing allusions thereto as the same were identified or referred to by number were mean-

ingless. Plaintiff's case was presented to stand or fall upon the exhibition by witness Kirk. Appellants' grievances go to the heart of his showing. The resultant prejudice from error of that magnitude is inescapable (*Points I, ante; XI, post*).

### Argument and Authorities.

(1) It was prejudicial error in the circumstances of this case for the Court to permit the display of said charts before the jury until the competency of the witness and the accuracy of his summary reproduced upon said charts was established and the same were received in evidence.<sup>3</sup>

(2) The rule permitting an expert to analyze and summarize involved accounts is an exception to the fundamental principle of evidence that a witness may only testify to those things that are within his personal knowledge. The exception exists to facilitate the discovery of truth rather than to confuse or prejudice it.<sup>4</sup>

Where, as here, there are substantial items of account which, for one reason or another, are omitted from the items analyzed and calculated by the witness, or where items chargeable severally are charged to both, it is obvious that his conclusion as to the financial status of said defendants at the critical time is worse than worthless.

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<sup>3</sup>Note 1, *ante*; *Turnmore v. McLeish*, 45 Cal. App. 266; *Thral v. Smiley*, 9 Cal. 520; *cf. Lisenba v. California* (1941), 314 U. S. 219, 86 L. Ed. 166, 176; *People v. Kynette*, 15 Cal. 2d 731, 755; *San Mateo v. Christin*, 22 Cal. App. 2d 375.

<sup>4</sup>Notes 1, *ante*; 6, *post*.

The ultimate question was, whether or not defendants concealed cash from the receiver, the answer to which depended upon plaintiff showing, not merely that they had received, but, also, that they had not expended the cash which they did receive. Expenses were just as important as receipts. Moreover, under a charge of joint concealment, where no conspiracy is alleged, the only relevant opinion the expert could give concerning unaccounted for cash is confined to what was jointly received or jointly controlled and excludes separate receipts by either defendant. This is not a situation such as arises where an expert opinion is admissible upon a certain hypothesis which does not necessarily embrace all of the evidence in the case.<sup>5</sup> But, in any case, it is prejudicial error to admit the conclusion and opinion of an expert which includes, omits or disregards facts and evidence which are part of the premise whence his deduction is necessarily drawn.<sup>6</sup> It was error to overrule the objections and deny the motion of defendants to strike the conclusion of witness Kirk as to the cash balance unaccounted for by defendants when such conclusion was not confined to all pertinent facts [R. T. 663-733 (objection), 793, 843-6, 856-7 (motion), 868-89].<sup>7</sup>

(3) For the reasons last stated it was likewise error to overrule defendants' objections to the introduction of said charts in evidence [R. T. (III) 729-33].

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<sup>5</sup>*Treadwell v. Nickel*, 194 Cal. 243, 267.

<sup>6</sup>*Note 1, ante*; *Citron v. Fields*, 30 Cal. App. 2d 51; *Bickford v. Lawson*, 27 Cal. App. 2d 416, 428; *Roberts v. Eldred*, 73 Cal. 394; *Lewy v. U. S.* (5 Cir.), 29 F. 2d 462, 62 A. L. R. 388; *Wigmore, Evid.*, Sec. 1230; 32 C. J. S. (Evid.), Secs. 475, 551-3; 22 C. J., p. 708 (N. 27); *Chamberlayne, Trial Evid.*, Secs. 924, 1012, 1014; *Anno*, 52 A. L. R. 1268; 66 A. L. R. 1206, 81 A. L. R. 1431.

<sup>7</sup>*Note 6, ante*.



VIII.

**The Court Prejudicially Erred in Receiving Evidence of a Returned Envelope Addressed to Scheules and the Testimony of the Postmaster to Show That the Former Was Not at the Place Previously Indicated by Defendant James A. Noell. (Points on Appeal, 11, 12.)**

**Statement of Record.**

The amended partnership bankruptcy schedules (B-3) listed an item of \$15,000.00 paid in Monrovia by defendants to purchase lumber from one Schueles in Roseberg, Oregon, in April, 1946 [Pltf. Ex. 4]. Witness Cheek, bankruptcy trustee, admitted that defendant James A. Noell had informed him, while investigating said matter, that said money had been expended without receipt or record. There was no proof to the contrary, and abundant evidence that defendants not only had sufficient funds therefor, and, as was customary in the days of the lumber shortage, they were obliged to resort to any source of supply they could find and upon the terms exacted by those who sold it [Pltf. Exs. 57, 58]. However, there was no evidence that either defendant ever claimed that Scheules resided or was in Roseberg or at any other location after the transaction in Monrovia alluded to by the husband.

Notwithstanding, plaintiff was permitted to show, as a part of its case in chief, that an envelope addressed by the bankruptcy trustee about July 12, 1946, to Schueles, Roseberg, Oregon, months after the time referred to by the husband, was returned undelivered by the post office. Thereupon, defendant husband offered to accompany the trustee to find Schueles, but the offer was declined [Pltf. Ex. 49, R. T. 186-8, 215-18, 230-2, 697-8]. In addition, plaintiff was permitted to show by the postmaster (Wim-

berly) from Roseberg that he was unacquainted with, and months after the Scheules transaction he made inquiry for Schueles in Roseberg and did not locate him [R. T. (II) 354-60].

### Argument and Authorities.

(1) Proof of the mailing of a letter duly addressed, with postage prepaid, raises a disputable presumption that it was delivered, but if the letter is returned in the mail to the sender it proves merely two facts, neither of which is relevant to this inquiry, namely, first, that the mail was not delivered to the addressee, and, second, that it was returned to the sender. There certainly is no presumption or inference from the latter circumstance that the addressee was not in the locality of the postoffice to which the said letter was addressed, and, much less so, that he was not there several months before or afterwards. No presumption of continuance runs "backward."<sup>1</sup>

(2) The postmaster's testimony was inadmissible for several reasons. First, he admitted merely a cursory inquiry, which in itself denied that Scheules could not then be found in Roseberg. Second, his inquiry was made months after the Schueles transaction and could not possibly reflect upon the question whether James A. Noell met him in Monrovia, California, when he stated he did. There is no presumption of continued presence in a certain locality and negative evidence is only admissible where the witness was in a position to have observed the critical fact.<sup>2</sup>

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<sup>1</sup>31 C. J. S. (Evid.), Secs. 140, 141, 136; *Liverpool L. & G. Co. v. Nebraska S. W.* (Neb.), 96 F. 2d 30; *F. W. Woolworth Co. v. Seckinger* (La.), 125 F. 2d 97; *U. S. v. One 1939 Truck etc.*, 35 F. 2d 905; cf. *Chamberlayne, Trial Evid.*, Secs. 420, 425, 136, 138, 139.

<sup>2</sup>31 C. J. S. (Evid.), Sec. 124; *Edwards v. California*, 314 U. S. 160, 173, 86 L. Ed. 119, 125; *Kansas City Life Ins. Co. v. Fox* (Tenn.), 104 F. 2d 321.

IX.

**It Was Improper Cross-Examination and Prejudicial Misconduct for the Government to Inquire of Defendant, James A. Noell, Concerning a Black Market Purchase Not Elicited on Direct Examination and Prejudicial Error for the Trial Court to Explore and Exploit Defendant's Privilege of Declining to Answer Upon the Ground of Self-Incrimination Before the Jury. (Points on Appeal, 13, 14, 15, 18.)**

Each defendant testified for the defense, described their business operations, property and accounts, and disclaimed withholding any assets from the Bankruptcy Court. Neither of them was asked or testified concerning any "black market" purchases of lumber for their partnership [R. T. (IV) 1062, 1090, (V) 1118, 1174, 1217, *et seq.*]. Notwithstanding, on cross-examination, the Government undertook to elicit testimony from James A. Noell that he had engaged in such transaction, and expended \$15,000.00 therein for which his books did not account—a fact which would eliminate over one-half of the concealment charged by the Government [R. T. (V) 1217-1225]

*"Cross-Examination.*

By Mr. Zack:

Q. Mr. Noell, when did you give \$15,000 to William Scheules?

Mr. Rose: Just a moment. I object to the form of the question as argumentative.

The Court: Sustained.

Q. By Mr. Zack: Did you give \$15,000 to William Scheules?

Mr. Rose: I object to the form of the question as not within the scope of the direct examination and I

assign the repeated questioning along those lines as prejudicial and improper.\*

The Court: Overruled. You asked him if he had given any property or money to anyone to hold for him or otherwise.

Mr. Rose: Yes.

The Court: He may cross-examine on that.

Mr. Rose: I asked if they held it for him. I said, 'other than has been reported in your petition and amended schedules.' That was the form of my question.\*

The Court: He may cross-examine on that. Objection overruled.

Mr. Zack: Will you read the question?

(Question read as follows:

'Q. Did you give \$15,000 to William Scheules?')

The Witness: *I wish to stand on my Constitutional rights.*

The Court: What do you mean by that?

The Witness: *It was a black market deal and any testimony I give may tend to incriminate me.\*\**

The Court: Please read the question, Mr. Reporter.

(Question read as follows:

'Q. Did you give \$15,000 to William Scheules?')

The Court: You say the answer to that question would tend to incriminate you?

The Witness: It may tend to incriminate me.

Mr. Rose: I have no objection to his answering the question. I want you to know what I am objecting to. I am objecting to his singling out this matter under cross-examination. It is not a matter

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\*R. T. (V) 1216:22-1217:1 (direct examination).

\*\*That should have halted further inquiry in the jury's presence.

that I made inquiry into. I have restricted my inquiry.

The Court: I understand your objection but you asked if anyone was holding any property.

Mr. Rose: Other than he has reported.

The Court: That is a broad question.

Mr. Rose: That has not been reported to the bankruptcy court.

The Court: Well, the witness is asserting his Constitutional privilege against self-incrimination. Now, do you mean by that that you would be incriminated in a matter other than this proceeding?

The Witness: It is possible, sir; it is possible.

Mr. Rose: I haven't any objection to him answering the question as to whether he did pay over the money, but the witness in response to an inquiry of Your Honor's has interjected a collateral matter that is not herein involved.

The Court: I will instruct you to answer that question. Do you understand the question?

The Witness: I do, yes. In the course of my business it was very necessary—

The Court: The question is, did you do that?

The Witness: I did, yes, sir. Not \$15,000, but \$17,000.

Q. By Mr. Zack: When was that? A. Again, must I answer that?

The Court: I instruct you to answer that question.

The Witness: \$2,000 in February.

The Court: What year?

The Witness: 1946. \$15,000 the last part of April, 1946.

Q. By Mr. Zack: In what form was it? A. It was cash. I was compelled to.



Mr. Rose: Just a second. You were just asked what form it was in.

Q. By Mr. Zack: Where is William Scheules now? A. I don't know.

Q. When was the last time you heard from him? A. Directly?

Q. Yes. A. At the time I gave the money, the \$15,000 to him.

Q. Where did you give him the money? A. At our place of business, 128 and 124 West Pomona, Monrovia.

Q. Where did you have the money?

Mr. Rose: Object to it as immaterial.

The Court: Overruled.

The Witness: I had it on my person and I had some of it there at the place of business.

Q. By Mr. Zack: How much did you have on your person? A. I couldn't tell you that.

Q. How much did you have at the place of business? A. I couldn't tell you exactly that. All I know is, I had it.

Q. Where were you keeping it at the place of business? A. In a little room that we termed the office. We had just moved down there. We had just purchased the property and built a \$1,788.00 fence. We spent about five or six thousand dollars fixing the lumber yard up, but we hadn't as yet finished our office, so we were using a room what originally was a feed room on a chicken and turkey ranch. That is what it was when we bought it. We were using that as a temporary office. That is where I had it hid—that is, part of it.

Q. Was anybody living there? A. I was out there.

Q. You were living there at the time? A. No. It was there part of the time when I wasn't there, but only for a day or so or three.

Q. Where did you get the \$15,000? A. Miscellaneous checks that had been cashed from the proceeds of Mrs. Noell's real estate. \$7,399.00 from one piece of property. There was \$6,497.00 from another piece of property. There was \$2,300 and some odd of another piece of property, and I think there was some more, too.

Q. Did Mr. Scheules give you a receipt for the money? A. A receipt was left with Mrs. Noell.

Q. Did you— A. Wait a minute. By me. I didn't know that there was a receipt.

Mr. Rose: Just a second, Mr. Noell. I am advising you as your counsel and I am taking objection to this form of inquiry and I am directing you as your attorney to respond only to questions that the court directs you to answer.

The Witness: All right.

Mr. Rose: I have some legal views on the subject and don't go beyond answering any question unless His Honor directs you to do so.

Q. By Mr. Zack: Did Mr. Scheules give you a receipt for the money? A. He did not give me a receipt.

Q. Were there any checks involved? A. No checks at all, sir.

Q. What did you give him the money for?

Mr. Rose: I object to that, Your Honor, on the ground it is not within the scope of the direct examination.

The Court: The witness claims his Constitutional privilege. I sustain the objection as to what the transaction was.

Mr. Zack: No further questions.

The Court: Do you claim your Constitutional privilege against self-incrimination? That is to say, you state on your oath under which you are now, that the answer to that question would tend to incriminate you in some other connection than this proceeding?

The Witness: What was the question? May I have it?

The Court: Read the question.

(Question read as follows:

‘What did you give him the money for?’)

The Witness: I don’t mind answering it.

Mr. Rose: As long as it has reached that stage, Your Honor has permitted this inquiry and I might as well permit him to answer the question subject to my objection.

The Witness: That is what I say. I want to answer it if I may.

The Court: It is a Constitutional privilege and the witness says that an answer to the question would tend to incriminate him in some other connection than this proceeding.

Mr. Rose: He interjected. It was a black market deal. That is in the record. That is before the court and jury.

The Court: I will sustain his claim of Constitutional immunity if he wishes to stand upon it.

The Witness: I don’t, sir. I would rather answer the question.

The Court: Very well.

Mr. Zack: If Your Honor please, I want to go into it fully.

The Court: If it is opened up at all it will be open to the fullest extent.

Mr. Zack: May I resume my cross-examination then, Your Honor?

The Court: You understand you are waiving your Constitutional privilege by the attitude you are taking now?

The Witness: I wished to not answer the questions in the first place, but I was forced to.

The Court: On your statement that the nature of the transaction and the details of it might tend to incriminate you in some other proceeding, I am prepared to sustain your claim of privilege to answer.

Mr. Rose: As his counsel I am advising him to answer.

The Court: Please, Mr. Rose, until I finish.

Mr. Rose: Pardon me.

The Court: I want the witness to understand that fully.

The Witness: I do, sir.

The Court: Now, if you wish to waive your Constitutional privilege against self-incrimination you may do so, but I want you to do so with complete undersanding.

The Witness: I realize that.

The Court: Up to this point nothing has been said about what kind of transaction it was; no inquiry has been made as to what kind of transaction it was.

The Witness: Well, I have told you—

Mr. Rose: Just a second. Do you wish to waive or stand upon your Constitutional privilege?

The Witness: I would prefer, yes, sir. I wanted to in the first place.

Mr. Zack: No further questions.

Mr. Rose: Step down, sir.

The Court: Next witness.

Mr. Rose: The defendants rest, Your Honor."

### Argument and Authorities.

(1) Common law rules of evidence govern a federal criminal trial, except as superseded by Congress or the Supreme Court (18 U. S. C., Sec. 3771; *F. R. Cr. P.*, Rule 26).

(2) It was not only improper cross-examination, as beyond the scope of the witness's direct examination,<sup>1</sup> but prejudicial misconduct for the prosecutor to explore an extraneous subject for no other purpose than demeaning defendants before the jury as criminal black-marketeers. Plaintiff's case in chief has been sustained with the denial of defendants' motion for acquittal [R. T. 934]. While evidence of a crime not on trial may be admissible where the facts thereof are within the issue under investigation (*Todorow v. U. S.* (9 Cir.), 173 F. 2d 439, 447 (N. 15)), or to prove knowledge, motive, intent, scheme, etc. (*Tedescon v. U. S.* (9 Cir.), 118 F. 2d 737, 739-41), those exceptions (*Smith v. U. S.* (9 Cir.), 173 F. 2d 181, 184) are strictly confined to their objectives and do not justify a dragnet to impugn an accused before a jury other than as the admissible evidence of the charge on trial does so.<sup>2</sup>

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<sup>1</sup>*U. S. v. Toner* (3 Cir. '49), 173 F. 2d 140, 144 (quoted *post*);  
*Northern P. R. Co. v. Urlin*, 158 U. S. 271, 39 L. Ed. 977;  
*Howard v. Comm.*, 25 Ky. L. R. 2213, 200 U. S. 164;  
*Cf. Heard v. U. S.*, 255 Fed. 829.

<sup>2</sup>*Boyd v. U. S.*, 142 U. S. 454, 35 L. Ed. 1077;  
*Hall v. U. S.*, 150 U. S. 76, 37 L. Ed. 1003;  
*Manning v. U. S.*, 287 Fed. 800;  
*Pierce v. U. S.*, 86 F. 2d 949;  
*Gart v. U. S.*, 294 Fed. 66;  
*Farkas v. U. S.*, 2 F. 2d 644;  
*Weil v. U. S.*, 2 F. 2d 145.



It was as much the prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." "Foul blows" are never just ones (*Vierick v. U. S.*, 318 U. S. 236).

The prejudicial effect of the inquiry was not destroyed by the refusal of the witness to answer the prosecutor who is deemed not to have asked the question without information that the witness was guilty (*Pierce v. U. S.*, *supra*).

Prejudice is presumed from such misconduct (*Berger v. U. S.*, 295 U. S. 78, 84, 79 L. Ed. 1314); and as held in *Krulewitch v. U. S.* (Mar. 28, 1949), 93 L. Ed. (Adv. Op.) 624, 627:

"In *Kotteakos v. United States*, 328 U. S. 750, 90 L. ed. 1557, 66 S. Ct. 1239, we said that error should not be held harmless under the harmless error statute (28 U. S. C. A., §391; F. R. Cr. P., Rule 52(a)) if upon consideration of the record the court is left in *grave doubt* as to whether the error had substantial influence in bringing about a verdict."

Jackson, J., concurringly added (93 L. Ed. 631):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf.* *Blumenthal v. United States*, 332 U. S. 539, 559, 92 L. ed. 154, 169, 68 S. Ct. 248, *all practicing lawyers know to be unmitigated fiction*. See *Skidmore v. Baltimore & O. R. Co.* (C. C. A. 2d N. Y.), 167 F. (2d) 54."

(3) Defendant, as a party, lost none of his privileges as a witness (18 U. S. C., Sec. 3481). Indubitable was his right under the Fifth Amendment, following the com-

mon law, to decline to answer any question which might incriminate him in another matter, *i.e.*, buying "black market" lumber in violation of the Emergency Price Control Act of 1942, as amended (Secs. 202, 204, 205, 50 U. S. C. A. Appx., Secs. 902(a), 904, 925(b), 18 U. S. C., Sec. 88).<sup>3</sup>

In *U. S. v. Toner* (3 Cir. '49), 173 F. 2d 140, 143-4, the cross-examination by defendant of a prosecution witness was halted upon the latter's claim of the privilege. In overruling the defense contention on appeal that the right of cross-examination was denied, the Court held (144):

(1) "Questions where the witness was protected in refusing to answer were related to matters remote from the subject matter of this prosecution. . . . *The questions had no relevance to the subject matter testified to by the witness on direct examination.* Counsel pressed upon the court the point that he was entitled to go into collateral matters to test credibility. The court replied that the matters inquired into were too remote. . . . We think his rulings here might well be sustained on this ground without any

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<sup>3</sup>18 U. S. C., Sec. 3482;

*Blumenthal v. U. S.* (9 Cir.), 158 Fed. 883, 331 U. S. 799;

*Quirk v. U. S.*, 161 F. 2d 138;

18U. S. C., Sec. 3482;

*Counselman v. Hitchcock* (1892), 142 U. S. 547, 562;

*Chamberlayne, Trial Evidence*, Sec. 259;

*Anno. 27 A. L. R.* 135;

8 *Wigmore, Evid.* (3 Ed. 1940), Sec. 2250 *et seq.*

reference to the privilege of self-incrimination at all. . . .”

(2) “The rulings were right with respect to self-incrimination. No one disputes the existence of the privilege of a witness to be protected against giving answers which will incriminate or degrade him. The privilege can be waived. The problem of waiver may become difficult. But there is no waiver here. This witness could not have refused to answer questions which did not incriminate him, and the questions asked in direct examination did not. He was entitled, therefore, to set up his privilege when the occasion arose. And he did.”

The guarantee is not waived by the bankrupt's being required to surrender his records to the receiver or to file schedules, nor can his exercise of such privilege be construed against him.<sup>4</sup>

*In re Bowman* (1930), 105 Cal. App. 37, 44, quotes the federal rule:

“When a question is propounded, it belongs to the court to consider and decide whether any direct answer to it can implicate the witness. If this be de-

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<sup>4</sup>*Re Harris* (1911), 221 U. S. 274, 279;  
*Arndstein v. McCarthy* (1920), 254 U. S. 71;  
*McCarthy v. Arndstein* (1923), 262 U. S. 355;  
*Boyd v. U. S.* (1886), 116 U. S. 616;  
*Brown v. U. S.* (1928), 276 U. S. 134;  
*Mulloney v. U. S.* (1935), 79 F. 2d 566;  
*U. S. v. St. Pierre* (2 Cir.), 132 F. 2d 837, 147 A. L. R. 240;  
8 *Wigmore, Evid.*, Sec. 2276.

cided in the negative, then he may answer it without violating the privilege. . . . If a direct answer may incriminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of his privilege. . . . it follows . . . that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not.”

(4) Defense counsel on direct meticulously avoided inquiry as to the Schueles transaction, and when cross-examination was attempted and erroneously permitted, he sought to keep the self-incrimination issue from the jury by insisting upon his original objection, which was again overruled. In erroneously overruling defendants’ objection to the cross-question, the Court forced him into the hapless position of either waiving his privilege and confessing a collateral crime, or of declining to answer upon the ground of self-incrimination; and, in either event, of disparaging himself and the defense of both defendants before the jury perforce a prosecution tactic, enlarged by the trial court, which should never have been indulged in. The effect was to deny the guarantee against self-incrimination. (*Pierce v. U. S.*, *supra*.)

There was only one means to minimize the damage when the Court's attention was early called to the constitutional privilege. The witness had not then committed himself because of the intervention of his counsel's objection. Immediately upon the involvement of the privilege being indicated, the Court should have excused the jury and in their absence have explained the witness's right, the consequence of its waiver, and ascertained the latter's election.

“A wise judge will make the inquiry in such a way as to protect the witness, and the authorities insist that it is his duty so to do.” (*Chamberlayne, Trial Evidence*, Sec. 262.)

Instead of exercising the only precaution available to avert the prejudicial dilemma which ensued, the trial judge proceeded to canvas the subject in painful detail. However unwitting and well intentioned the trial judge, the inescapable effect of the inquisition was to impress upon the jury the damaging fact that a defendant on trial for concealing assets and false swearing, and the husband of his co-defendant, had theretofore been implicated in a \$15,000.00 transaction which he dare not testify about lest he confess another felony! *And that was the last word heard by the jury from the witness box!*

If the learned trial judge was too dubious of the disastrous consequences to have then declared a mistrial, or to have admonished the jury to disregard the colloquy, we may wonder how he could have been so oblivious of the course of the virus when, after 12 days of trial, the jury



returned verdicts of guilty in *one hour and 25 minutes* [Tr. 14] in ignorance of the contents of 150 exhibits as to have denied a new trial [Tr. 18, 20, 21].

It is the constitutional duty of any Federal Court, *nisi prius*, or appellate, to so exercise the judicial process that all the fundamental rights of the accused, including those of a fair trial and protection against a self-incrimination, are effectuated. It is not a question of forms, styles, or even immemorial customs, but whether or not what was done impaired a fundamental right or imposed a burden upon the accused to the detriment of his defense, which a reasonable, impartial administration of justice neither requires nor condones.<sup>5</sup>

And, as was recently held in *U. S. v. Kobli* (3 Cir. 1949), 172 F. 2d 919, 921:

“At the outset we note that it is not necessary for the appellants to show that she was in fact prejudiced by the action of the trial judge. If that action violated her constitutional right we agree with the Court of Appeals of the Eighth and Ninth Circuits that a ‘violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite personal injury. To require him to do so would im-

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<sup>5</sup>*Ashcraft v. Tennessee*, 322 U. S. 143;

*Powell v. Alabama*, 287 U. S. 45;

*Glasser v. U. S.*, 315 U. S. 60.

pair or destroy the safeguard.'” (Cit. *Davis v. U. S.* (8 Cir.), 247 Fed. 394, 398-9, L. R. A. 1918C, 1164; *Tanklay v. U. S.* (9 Cir.), 145 F. 2d 58, 59, 156 A. L. R. 257.)

While the foregoing involved the denial of the guarantee of a public trial under the Sixth Amendment, there is no difficulty in discerning prejudice from the violation of the coeval guarantee against self-incrimination under the Fifth.

Even where the error was not called to the trial court's attention to normally exclude its consideration on appeal, this Court has recently said (*Smith v. U. S.* (9 Cir. 1949), 173 F. 2d 181, 184:

“However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would seriously affect the fairness, integrity, or public reputation of judicial proceedings. The appellate tribunal will examine the record sufficiently to determine whether such has occurred.” (See citations.)<sup>6</sup>

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<sup>6</sup>*Accord*: Rule 5(b); *Giles v. U. S.* (9 Cir.), 144 F. 2d 860; *Todorow v. U. S.* (9 Cir.), 173 F. 2d 439.

X.

**Judgments of Imprisonment Imposed Upon Defendants Upon the Recommendation of the Prosecutor's "Committee" to the Trial Judge Are Denials of Due Process of Law. (Points on Appeal, 1, 7.)**

June 18, 1948, defendants were convicted, both causes were referred to the probation officer and continued to July 12, 1948, when sentences were pronounced and judgments entered [Tr. 13, 14, 22] after defendants' several motions for acquittal and new trial were denied [Tr. 17-21]. Defense counsel argued said motions at length [R. T. 1274] and each defendant made a statement reiterating his and her innocence to the Court [R. T. 1305], when the following transpired [R. T. (V) 1315:22-1316:11):

"The Court: What does the Government recommend?

Mr. Zack: The Government recommends three years confinement as to each defendant.

The Court: What fine does the Government recommend?

Mr. Zack: No fine, your Honor.

The Court: I don't think I understand your statement.

Mr. Zack: *The recommendation of the committee that considered these matters was three years confinement as to each defendant but no fine.*

The Court: Is it the theory of the Government that all this money that was concealed has now been spent?

Mr. Zack: We don't know where it is, your Honor. We haven't been able through the investigation that has been carried on to come to any clues. We have some, but they are not the type that were admissible in evidence."

After discussion with counsel wherein the Court obviously concluded that defendants concealed \$32,011.66 from the bankruptcy receiver on May 22, 1946 (Count I) because Kirk said they had it months before, sentences of three years each and a payment of a \$5,000.00 fine by each defendant as a condition of probation was imposed [R. T. 1321 *et seq.*].

### **Argument and Authorities.**

Who was this "Committee," lurking furtively in the shadows with the prosecutor as its mouth-piece? It was no person or group ordained by law or before whom defendants were accorded a hearing ere it memorialized its momentous recommendation. But as a "Committee" is always derivative, it must have been at large before its fiat of three years imprisonment, which exactly coincided with that of the judge's whose pronouncement was not uttered until the former's was officially recorded. If it does not appear that the "Committee" effected the part of the good women who appeared at the sepulchre to claim the Master's body they missed none of their cue from the preceding scene when demand was made of Pilate that he "crucify him." What followed in each case speaks for itself. If the judge would not absolve defendants, the "Committee" confessed their inability after two years of frantic search to find any part of the subject of the alleged cash concealment.

The rules require that sentence be imposed and the judgment signed by the judge and entered by the clerk after pre-sentence investigation by the probation officer (*F. R. Cr. P.* Rule 32). Probation officers are appointed by and responsible to the court, and to no one else (18 *U. S. C.* Sec. 3654). While their pre-sentence reports should, and customarily do, reflect upon the qualifications

of a defendant for probation, there is no authority in any law for any judge to entertain a "recommendation" by any "Committee" from any source, and especially not from the office of the accused's prosecutors, concerning the sentence to be imposed, as was done below. Judge Lynne for the Northern District of Alabama in *U. S. v. Christakos* (Apr. 6, 1949), 83 Fed. Supp. 521, 525, recently made some wholesome observations in ruling upon motions to vacate sentences:

"There is something essentially incongruous in a judge's arrogation of the office of an attorney in relation to the accused. He is not entitled to information relating to the social and economic background of a defendant, including his prior criminal record, if any, as disclosed by the report of presentence investigation, until after a plea of guilty has been received. It is fair to assume that this safeguard was inserted in the criminal rules (*F. R. Cr. P.*, Rule 32(c) to insure the fact, as well as the appearance, *that the judge is an arbiter and not an arm of the prosecution.*"

Congress may have plenary power to prescribe the jurisdiction of the District Courts of the United States (*U. S. Const.*, Art. I (8-(9, 18); 18 *U. S. C.* 3231) and to delineate the administrative functions and increase the duties of the Attorney General (*U. S. Const.*, Art. I (8-(9, 18))<sup>1</sup> whose executive office, however, has no constitutional prerogative for abridging the independence of the

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<sup>1</sup>*Shoemaker v. U. S.* (1893), 147 *U. S.* 282, 301.



judiciary (*Ibid.*, Art. II (1, 2): Arts. III, VI). The executive's duty to "take care that the laws be faithfully executed" (*Ibid.*, Art. II, Sec. 3) does not clothe "the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice," nor to deny or impede due process of law.<sup>2</sup>

The grant of power to Congress (Art. III, Secs. 1, 2) to establish inferior federal courts and to fix their jurisdiction does not authorize the legislature to exercise judicial power<sup>3</sup> nor to abrogate the common law powers of judges acting within such jurisdiction,<sup>4</sup> *e. g.*, the construction of law or fact.<sup>5</sup> Judicial power "*is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.*"<sup>6</sup> A power is not judicial unless it is exercised by judges appointed by the President with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries.<sup>7</sup> Nor may a

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<sup>2</sup>*Kendall v. U. S.* (1838), 12 Pet. 524, 610-13; *Ex parte Merryman* (1861), 17 Fed. Cas. 9487; *Ex parte Milligan* (1866), 4 Wall. 2; *Duncan v. Kahanamoku* ('45), 327 U. S. 304, 90 L. Ed. 688.

<sup>3</sup>*Kilbourne v. Thompson* (1881), 103 U. S. 168; *Andrews v. Hovey* (1888), 124 U. S. 694, 717; *Prigg v. Pennsylvania* (1842), 16 Pet. 539.

<sup>4</sup>*Den v. Hoboken L. & I. Co.* (1856), 18 How. 272, 284; *Liverpool L. & G. I. Co. v. N. & M. Friedman Co.* (1904), 133 Fed. 713; *Ex parte Robinson* (1874), 19 Wall. 505.

<sup>5</sup>*U. S. v. Klein* (1872), 13 Wall. 128, 147; *James v. Appel* (1904), 192 U. S. 129; *Monongahela N. Co. v. U. S.* (1893), 148 U. S. 312.

<sup>6</sup>*Muskrat v. U. S.* (1911), 219 U. S. 346, 356.

<sup>7</sup>*Re Kaine* (1853), 14 How. 103, 120.

federal court usurp the executive function of suspending a sentence imposed by law without legislative authority.<sup>8</sup>

The grant of judicial power (Secs. 2, 3) to inferior federal courts (Sec. 1, Art. I) in "all cases, in law and equity, arising under this Constitution, the laws of the United States . . ." includes jurisdiction over federal crimes and their punishment<sup>9</sup> by a judge whose decision ought to be as free from the influence of some prosecutor's "Committee" as of a mob that storms his bench or otherwise impedes his judicial function.<sup>10</sup>

The gravity of this question hardly needs elaboration. What Lord Acton said a century ago about the corruption of power, a modern philosopher has amplified. "For if law is anything which Power elaborates, how can it ever be to a hindrance, a guide or a judge?" Thence he answers: "Law has lost its soul and becomes a judge."<sup>11</sup>

Federal criminal jurisprudence has so vastly expanded in late years that there is no session of Congress without urgent petitions for more judges, prosecutors, crime detectors, and other functionaries. If this is not the place to lament a bureaucratic wedge that has been driven be-

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<sup>8</sup>*Ex parte United States* (1916), 242 U. S. 27; *Frad v. Kelly* (1932).

<sup>9</sup>Note 2, *ante*; *Const.*, Art. I, Sec. 2(3); Amends. 5, 6; 18 U. S. C. 3231.

<sup>10</sup>*Jordan v. Massachusetts* (1912), 225 U. S. 167, 176; *Turney v. Ohio* (1927), 273 U. S. 510, 523, 531; *Frank v. Mangum* (1915), 237 U. S. 309, 315; *Moore v. Dempsey* (1923), 261 U. S. 86; *Powell v. Alabama* (1932), 287 U. S. 45, 68.

<sup>11</sup>*Bertrand de Jouvenel "On Power,"* pp. 302, 316; *The Viking Press*, 1949.

tween the people and representative government, it surely is pertinent to remonstrate abuses that may be relieved by the judicial process. For if the final bulwark against oppression is adamant, the tyranny of myriads and swarms of unelected, federal officials and servants is as inevitable as the corruptive aggression of all unbridled power has always been and ever will be. The time to arrest an unconstitutional tendency is in its incipency. "Every journey to a forbidden end commences with the first false step."

The judicial process is indivisible. The only influence a judge is entitled to heed is that of God, his only accredited oracle (*Deut.* 1:16, 17; *Clark's Biblical Law*, 438, 32-40, 47; *Bacon's Essay*, "Judicature.") Though "made of the same stuff as other men," a judge must be "perfectly and completely independent with nothing to influence or control him but God and his conscience." (*U. S. v. Manton* (2 Cir. 1938), 107 F. 2d 834, 846 (quot. Marshall, C. J.)). History is not without cruel example in Inquisition and Star Chamber of the disobedience of Moses' ancient commandment and what respect men have learned of the rights of their fellows is in no small part attributable to the local judge who finds his enlightened guidance in "God and his conscience." Let not this oracle be fogged by the breath and it never will be corroded with the influence of extra-judicial "Committees."

# XI.

## Defendants Were Denied the Fair and Impartial Trial Guaranteed by Due Process of Law in the Fifth Amendment.

Appellants insist that errors involving the denial of motions for acquittal and a new trial because of the insufficiency of the evidence are not within the Harmless Error Statute which is confined to errors that “do not affect the substantial rights of the parties” (28 *U. S. C. A.*, Sec. 391; *F. R. Cr. P.*, Rule 52(a)); nor are the other errors harmless “if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict” (*Krulewitch v. U. S.*, 93 L. Ed. (Adv. Op.) 624, 627). This Court has recently said that where “no one incident is sufficient to warrant reversal,” their appraisal “to determine whether, in the aggregate, they adversely affected the substantial rights of the appellants” necessitates their consideration “in their natural and proper setting, namely, the entire record” (*Todorow v. U. S.* (9th Cir. '49), 173 F. 2d 439, 448).

The difficulty in applying the foregoing rule upon any appeal leaves a litigant largely at the mercy of the trial court insofar as the judicious appraisal of witnesses and evidence is concerned. It may be that, with the aid of improved mechanisms for the visual and articulate reproduction of courtroom scenes and utterances, appellate courts will be able to appreciate sufficiently of the atmosphere of the trial to find a better rule than that which closes the door upon a party whose preponderance

of evidence is denied efficacy because the appellate judges could not see or hear perchance one dissident who testified to the contrary. None the less, appellate courts recognize that such trial atmosphere as is imparted to them by the record must be considered in determining the fairness of the action complained of (*supra*).

In this case, the appellate court is given an insight at the outset of the trial of one influence that dominates all others. During a preliminary colloquy between Court and counsel concerning the issues and anticipated evidence, wherein defense counsel emphasized the danger of improper influences upon the jury, the Court replied: "*They might do that, Mr. Rose, but I have ultimate faith, utmost faith, that it achieves justice, and I have never seen a verdict yet come into this courtroom that I could say was unjust*" [R. T. 50].

In discussion of the evidence with counsel during the hearing of the motions for a new trial, the Court observed that John Buscemi "is a confessed perjurer" [R. T. (V) 1293]; and "like any case that is built on circumstantial evidence, it is easy to find strong views on both sides" [1305]. Defense counsel pointed out the influences and dearth of evidentiary substance in the words and scrolls conjured by the prosecution. The Court replied, "*Juries don't convict people on those things when they are told before they may convict they must believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendants are guilty. If that is so that they must acquit them.*" [*Ibid.* 1303-4.] Although "unmitigated fiction," to requote Mr. Justice Jackson, it is never-



theless true that "out of the abundance of the heart the mouth speaketh" (*Matthew*, 12:34).

Therein is not only further proclamation of the perfection of juries, but in the setting of motions to acquit and for a new trial, where the judge was obliged to determine credibility and weigh evidence, he resolved the question from the posture of the jury's belief. *The judicial question was, not what they believed, but what they were entitled to believe from the judge's appraisal of credibility and evidence.* By his own revelation, the learned trial judge denied consideration of their motion according to the only standard and in the only tribunal in the federal system that is competent to weigh evidence. (*Applebaum v. U. S.* (3 Cir.), 274 Fed. 43; cert denied 256 U. S. 704.) In that case it was said (46):

"If a defendant asks that a verdict be set aside because it is not supported by the required weight of evidence, his motion is addressed to the discretion of the trial judge. In order properly to exercise that discretion it is manifest that the trial judge, as well as the jurors, should attentively consider and weigh evidence as it is being introduced, *because in that respect he is sitting as a thirteenth juror. It is the exclusive and unassignable function of the trial judge to grant or refuse a new trial in cases of conflicting evidence.*"

The Court then contrasts the function of an appellate tribunal in determining whether any substantial evidence supports the verdict and says:

"But the review of that question of law is the exercise of a function that should not be confused with the non-transferable function of the trial judge in acting as the thirteenth juror."

The learned trial judge is a man of stubborn convictions. While indubitably sincere in vindicating the many verdicts returned in his Court, the revelation discloses a Utopian state of existence which has not been heretofore officially recognized in the history of mankind, nor suggested by the result of this case. Of all the necromancy, wizardry and voodooism that conspires to iron-curtain, the cracks of truth from human consciousness, none is more subtly venomous than the pharasaical heresy of mortal omnipotence (*Genesis*, 3).

The commendable aspiration of righteous thinking persons who attain to perfection is not to be confused with the reality that in this "Valley of Decision" life is an experiment and evolution has not yet run its course. For any judge to become hypnotized with the notion that an unjust verdict has never been returned in his court is to confess a delusion respecting the propensity of persons to err and the universal capacity therefor which is adamant to its discernment or correction. For error is no more cured by kindness than is darkness removed by the night. This trial had its inception and ordeal under the predominating influence of a trial judge who implied very strenuously then, as he asserted thereafter [R. T. (V) 1303-4] that the jury, like the ancient kings, could do no wrong. Bitter experience has constrained Anglican jurisprudence to find the contrary.

The foregoing does not in the least challenge the sincerity or good intentions of the trial judge, but necessarily emphasizes an insuperable barrier to the avoidance of error by granting a motion to acquit and to the correction of error by granting a motion for a new trial. In fairness, it is admitted that throughout the extended trial of the action the Court made many difficult decisions and

manifested commendable diligence and attention to the proceedings and their expedition. But whether the individual be saint or sinner, the object of his vision will always be colored according to his mental window-panes.

While it may have been an oversight in the first instance that the 150 written exhibits were not shown or read to, or taken by, the jury, there is no other apparent reason for the Court's statement upon the motion for a new trial that he was not surprised at an early verdict [R. T. (V) 1292] than his imputed omnipotence to members of the panel who, by this time, were not only incapable of injustice but seemingly had become imbued with some miraculous sense whereby they could discern and weigh the documentary evidence without any articulate means for its perception!

Defense counsel was indulged at great length in presenting his motions for acquittal and new trial [R. T. 934, 1274]. The burden of those motions was directed to the insufficiency of the evidence which appellants have undertaken to expose in the preceding sections of this brief. The trial judge enjoyed a prerogative which is denied appellate courts in that it was his duty to pass upon the credibility of witnesses and weigh the evidence. From time immemorial our jurisprudence has clothed trial judges with this supervisory power over verdicts. Its exercise not only demands an impartial review but, throughout that process, a mind that is not obscured by the Utopian dream that jurors are incapable of somnolence, distraction, stupidity or error. That remedy is denied

before the process is invoked where the mind of the judge is obsessed with the conviction that a jury in his Court could do no wrong. It followed, therefore, as was to have been expected, that the motions for acquittal and new trial resulted in no correction of any of the errors complained of, while appellants were denied a salutary right which contemplates a judicial rather than a Utopian function.

### Conclusion.

It is respectfully submitted that the judgments appealed from should be reversed.

Respectfully submitted,

A. BRIGHAM ROSE,

*Attorney for Appellants.*









## APPENDIX.

### Fact Brief.

*Foreword:* The bulk of the evidence was addressed to Count I, charging defendants jointly with concealing \$25,000.00 and a Chevrolet car (*Points II, III, IV*) which incidentally relates to the charges of false swearing in *Counts II and III* (*Points VI, VII*). The pertinent oral and documentary evidence concerning the foregoing is discussed in this Fact Brief, except for what has already been presented with the objection to the accountant's summary, opinion and charts (*Point VII, ante*) and the Scheules' transaction (*Point IX, ante*) whose immediate availability renders extensive repetition necessary.

The evidence indisputably shows that defendants, husband and wife, formed and conducted a partnership business whose capital and assets comprised all of their community property. The wife owned several parcels of realty, as her separate property, which she sold before bankruptcy and applied the proceeds upon partnership operations and debts and the living expenses of herself and family. Those advances were made when the partnership was insolvent and so continued until bankruptcy. But it is the proceeds of those sales that plaintiff charges *both* defendants with concealing!

The latter deduction is attempted from plaintiff's analysis of the income and expenses of defendants, as individuals, and as a partnership, by F. B. I. accountant Kirk, whose audit and summary are confined to partnership, bank and escrow records [Exs. 57, 58]. The partnership books were not posted to the date of bankruptcy and there were many purchases of lumber and operating expenditures for the partnership that were not recorded in the partnership books. Defendants did not keep in-

dividual books of account. Evidence of the wife's individual sales was produced from bank and escrow records and her testimony. This expert, who was the spearhead and backbone of the prosecution, arbitrarily disregarded outlays for thousands of dollars worth of supplies, whose records were unsatisfactory to him. He also omitted thousands of dollars in purchases whose evidence he refused to accept (*Points II, VII, ante*).

However, appellants perceive no necessity for reproducing here the mass of foundational evidence of receipts and expenses utilized by plaintiff in the summary and conclusion of its expert. It will suffice for this case to accept that foundation for argument only in so far as it is correct and demonstrate from its omissions and fallacies that a conclusion of concealment is unwarranted. Hence, appellants will merely refer to the foundational items and then proceed to the points which demolish the verdicts.

It is noted in *Point II, ante*, that defendants' bankruptcy schedules and examinations as to their individual or cash assets by the referee are not made the subjects of indictment for false swearing as in the case of the car under *Counts II and III, post*.

Preceding the latter is a general statement of undisputed facts bearing upon the relationship of the parties, their business, assets and bankruptcy.

Separately summarized is all the evidence bearing upon the ownership of the Chevrolet car, which is also the subject of alleged concealment in *Count I*, the wife's alleged false bankruptcy schedule in *Count II*, and the husband's alleged false testimony in *Count III, post*.

## HISTORY OF BUSINESS AND BANKRUPTCY.

Defendants intermarried 27 years ago and have two married children. Prior to defendants' partnership, formed October 20, 1945, the wife, who had resided in California for 30 years [R. T. 1090], had no similar business experience [1062-3]. The husband had been a carpenter, realtor and a refrigeration engineer and dealt in building materials about 6 months before the partnership [1090, 1175]. They come of good family without suggestion of any criminal record [1309-10].

Their partnership, Pacific Firm-Bilt, had no other members than themselves and until February, 1946, its headquarters was a demonstration house on Colorado Boulevard, Pasadena, California, whence it was moved to property purchased by Mrs. Noell for \$16,000.00 at 128 West Pomona Avenue, Monrovia, California [1063]. It engaged in buying and selling lumber, windows, sashes, doors and building material for housing accommodations. In March, 1946, they set up a small mill in their lumber yard where some processing was done. When orders were not immediately filled, sales were made upon contracts for future delivery [1091-4].

Due to the lumber shortage and the necessity for re-funding upwards of \$50,000.00, the partnership became financially involved to the extent that Mrs. Noell liquidated her separate holdings to keep the business afloat. There were assets consisting of the real estate, purchased by Mrs. Noell and used by the firm (appaised for \$35,800.00) its equipment and lumber (\$8,000.00) and some accounts receivable and cash, against \$49,713.93 in creditors' claims and the average employment of 10 men had dropped to 5 when its operations ceased about May 13, 1946 [R. T. 175-83, 189, 197-213, 1101]. Creditors'



suits were pending and threatened [R. T. 1101, 1144-6 [Ex. 46] 1030-40]; and on May 22, 1946, defendants filed individual and partnership bankruptcy petitions [Ex. 4 *et seq.*] and were adjudicated bankrupts [Exs. 1, 2, 3] when Crules R. Cheek was appointed receiver, and on July 3, 1946, trustee [Exs. 4-H, 4-I, R. T. 167 *et seq.*]. Numerous examinations and hearings were had over several months before the various referees to whom the matters were assigned [Pltf. Ex. 4-J].

### PLAINTIFF'S CASE.

Plaintiff's case in chief, concerning the concealment of cash (it had no rebuttal) consisted of foundational evidence, oral<sup>1</sup> and documentary<sup>2</sup> to show the *combined* income and expenditures of defendants, individually and

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<sup>1</sup>G. B. Kellogg [R. T. 71]; C. K. Cole [77]; R. E. Wilson [84, 403, 765]; W. J. Brewer [87, 389]; Ruth Daley [112]; Isabelle Atkisson [119]; A. R. Nold [127]; Harry Barber [133]; R. H. McCalla [144]; Crules R. Cheek [167, 638]; H. Allen Stanhilber [329]; Mrs. Josephine Cross [331]; Frank Grillo [337]; Henry H. Carter [341]; Neola G. Wittler [346]; Richard B. Morey [349]; Lester L. Wimberly [354]; Bernice Bailey [410]; Maurice A. Wolfe [415]; Amy J. Both [574]; William Gosman [618]; G. B. Kellogg [623]; Ruell D. Callahan [650]; Dennis Earhart [900]; Johnny Richardson [906]; Theodore Peterson [909]; Mrs. L. T. Knapp [911]; Mrs. Anne Glasbrenner [914].

<sup>2</sup>Pltf. Exs. 1, 2, 3 [R. T. 22, 23]; 4, 4A, B, C, D, E, F, G, H, I, J [R. T. 29, 30, 52, 53, 54]; 8, 9 [78, 678]; 10, 11 [84, 678]; 12 [87, 678]; 13 [88, 679]; 14, 15 [89, 679]; 16, 17 [91, 108-9]; 18, 19, 20, 21 [91, 683]; 22, 23, 24 [98]; 25 [114]; 25-B [117]; 26 [120]; 36, 37 [128]; 27, 28, 29, 30, 31, 32, 33, 34, 35 [132-3, 686]; 40 [162, 926]; 41 [174]; 42, 43, 44 [182, 695]; 45, 46 [183, 696]; 47 [185, 697]; 48 [197]; 49, 49-A [699]; 50 [245, 699]; 51 [257, 701]; 52 [277, 703]; 53, 54, 55 [278, 703]; 53, A, B, C, D, E, F, G, H, I, J, K, L, M [280, 703]; 54-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P [290, 703, 1143]; 55 [707]; 55-A [620, 706]; 56, 56-A [578, 708]; 56-B [667, 708]; 56-C [668, 708]; 56-D [1052]; 57, 58 [732]; 59 [304, 709]; 60 [317, 710]; 60-A [710]; 61 [318, 710]; 62 [322, 702]; 63 [329, 711]; 64 [332]; 65 [337, 712]; 66 [342, 712]; 67 [350, 712]; 68 [351,

as a partnership *without segregation*, which was summarized by F. B. I. accountant, George M. Kirk<sup>3</sup>

No useful purpose would be subserved in detailing this foundational evidence because, assuming its verity, as has been shown in the analysis in *Points VII and VIII, ante*, plaintiff's claim of \$32,011.67 as unaccounted for by defendants, excludes defendants' cash and check expenditures for which witness Kirk allowed no credit and is based upon the following fallacies in his summary and charts [Pltf. Exs. 57, 58, R. T. 291, 296, 732]:

(1) February, 1946, Mrs. Noell purchased as her separate property the premises where the partnership operated, for cash [Ex. 26, R. T. 119-24, 178].....	\$16,000.00
(2) Scheules' transaction ( <i>Points VII, VIII, ante</i> ) .....	17,000.00
(3) James A. Noell purchases by check not credited in Ex. 57 ( <i>Point VII</i> ) [R. T. 872-87] .....	8,000.00
(4) Cash purchases by James A. Noell, excluding Scheules' deal ( <i>post</i> ).....	12,380.00
(5) Cash advanced to Louis Stroh for lumber purchases ( <i>post</i> ) .....	3,000.00
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Total credits omitted from Exs. 57, 58	\$56,380.00

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712]; 69 [370, 712]; 70 [379]; 71 [390, 714]; 72 [393, 714]; 73 [394, 715]; 74 [395, 715]; 75 [404, 715]; 76 [413]; 77 [416, 717]; 78 [471]; 79 [524]; 80 [576, 717]; 81 [621]; 82 [624]; 83, 84 [625]; 85, 86 [626]; 87 [627]; 88 [628]; 88-A [961]; 89 [631]; 90 [640]; 91 [652, 917]; 92, 92-A [1173]; 93, 94, 95, 96, 97 [658, 718, 720]; 98 [766, 767]; 99 [926]; 100 [903]; 101 [907]; 102 [910]; 103 [912]; 104 [915]; 105 [1047]; 106 [1051].

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<sup>3</sup>R. T. 161, 235, 269, 658, 849.

The last tabulation allows defendants nothing for cash expenditures from October, 1945, to May, 1946, inclusive, for operating the business, *c. g.*, labor, utilities, transportation, etc., and for their home and personal maintenance for which no records were produced; nor does it include cash refunds by defendants to customers for which records were surrendered to the receiver but not produced. James A. Noell made several trips to Oregon and other distant points in quest of lumber. Witness Kirk admittedly excluded all of said credits in his summary (*Point VII, ante*). But the foregoing tabulation is enough to show that no cash remained for concealment.

There is hereinafter produced a further accounting of defendants' receipts and disbursements.

#### DEFENSE.

*Amelia E. Noell's separate property.* There can be no doubt from Mr Kirk's summary and charts [Pltf. Exs. 57, 58] that, except for the cash contributions and expenditures by Mrs. Noell for the partnership, it was insolvent in March, 1946.

On and before October 20, 1945, she owned as her separate property numbers 4195 York Boulevard, Los Angeles, California, and 429 West Longdon Avenue, Arcadia, California, which were sold by her, as shown by the escrow papers, reflected in Kirk's chart [Ex. 57] and whence she personally received and paid into the partnership business and for "fulfilling contracts" [R. T. 1064, 1084]. Her personal records are confined to her check stubs [1078]. Witness Kirk charges her with the receipt of \$16,636.58 from the sales of such properties [R. T. 888-9; Ex. 57].

That *separate* property in personal control was erroneously included in the lump balance of \$32,011.67, which should reduce the amount chargeable to *both* defendants to \$15,385.09. It is next shown, however, that each defendant accounted for *all* monies within his or her control.

*Disposition of cash receipts by Amelia E. Noell.* April 3, 1946, Mrs. Noell cashed a \$3,400.00 check [Exs. 28, 57] which was used for family expense and the partnership [1128-30]; likewise, April 5, 1946, a check for \$2,339.33 [Exs. 17, 57; R. T. 1130-33]; also April 10, 1946, \$4,000.00 for "buying lumber" [Ex. 29], which was part of the \$6,400.00 from the sale of her property [R. T. 1133-51]. Likewise, \$7,000.00 from an escrow [Ex. 25-A; R. T. 1136-8]. A check dated April 22, 1946 to Mr. Noell for \$2,500.00 [Ex. 30], making a total of \$19,239.33 checks cashed in April, 1946, was similarly used [1138-41; see, also, pp. 131-3].

Likewise in May, 1946, Mrs. Noell received the proceeds of the following checks, which were used for similar purposes, medical and dental bills,—May 1, \$400.00 [Ex. 35]; May 2, \$158.01 [Exs. 34, 54-P]; May 10, \$500.00 [Ex. 32]; May 10, \$800.00 [Ex. 21]; May 10, \$443.55 [Ex. 20]; May 20 \$399.48 [Ex. 25-B]; May 13 \$271.30 [Exs. 31 55-B]. The foregoing are summarized on Plaintiff's Exhibit 57 [R. T. 1141-5] and total \$2,972.34, plus the Buscemi check of ~~\$846.00~~ for the sale of the car cashed May 13 [Ex. 69; R. T. 1155-61].

From the foregoing, defendants also paid \$200.00 by check [Ex. 92-A] as fees to their attorney for the bankruptcy matters and \$100.00 costs [1167-9, 1172-4]. Defendants' household expenses never exceeded \$400.00 per month. Some cash was paid to Stroh as well as Mr.



Noell to buy lumber and make refunds on contracts. None of the cash charged to defendants on Exhibit 57 was retained by them after bankruptcy [1170-1].

*Disposition of cash receipts by James A. Noell.* Defendant James A. Noell was in charge of the yard and the buying of materials, which were difficult to obtain. He made many "under the counter" purchases besides those for the partnership by Louis Stroh [R. T. 980 *et seq.*] and enumerated cash outlays to ten dealers and Scheules for which no invoices or receipts were given and amounting to over \$27,000.00, \$2,000.00, \$2,800.00, \$1,000.00 minus, \$980.00, \$1,800.00, \$.....(?), \$.....(?) \$2,000.00 and others he could not recall [1175-86] besides \$1,800.00, to contact a dealer, Barger [1186-8, Defts. Ex. F]. He paid \$17,000.00 on the Scheules deal [*Point VIII, ante*; R. T. 1217 *et seq.*]. Stroh set up the Monrovia yard and mill for defendants in February, 1946. Lumber was received in March [980-5]. He always carried defendants' cash for lumber and parts purchased to and including May, 1946, from 15 dealers without invoices or receipts [985-93]. He made hundreds of such purchases from \$39.00 to \$900.00 [1009-28, 1043-56, 1058-9].

*Refunds.* Mrs. Noell ran the office, attended to banking, kept the books with the assistance of others, and drew blueprints for prospective purchasers of houses under contract, *c. g.*, Plaintiff's Exhibit 47, though she surrendered as many more of said contracts to the receiver, which plaintiff has not produced in court [1073-7]. She did none of the purchasing or construction work [1083-4].

Numerous witnesses attested the lumber shortage, of which judicial notice may be taken, as confirmed by Harry Barber, who testified to defendants' efforts to



produce building materials in Oregon [R. T. 133-44]. When orders could not be filled, refunds were made and this occurred under many contracts. Some refunds were made by check [Ex. 50; R. T. 257 *et seq.*] and others by cash for which receipts were taken and delivered to the receiver, but not shown in Plaintiff's Exhibits 57 and 58, nor were same produced by plaintiff [1076-8]. Witness Kirk's summary of \$36,297.47 of such refunds is confined to canceled checks [Ex. 58] and *does not reflect those made in cash* [1084-6].

There was no "average" deposit by customers; the amount depended upon the kind of deal which occasionally was for the full price and sometimes for less. When the material was obtained and paid for it was delivered [1095-6].

*Books and Records.* Mrs. Noell had no training as a bookkeeper. The partnership books were set up by accountant Matheson [Exs. 45, 46] and contain entries by her, him and Mrs. Neola Whittler, her sister and a bookkeeper, and were not posted to date because she frequently erred in entering items in the wrong column, and as the accountant admonished her not to make alterations, she adopted the practice of making and preserving memos. of transactions to be entered by him or her sister. Defendant surrendered all of this memoranda, more than 100, to the receiver with the rest of defendants' records, including sales contracts [Pltf. Exs. 42, 43, 44, 45, 46, 47; R. T. 182-8, 1078-82]. Some were never entered [1095-7]. Exhibit 45 shows cash entries to April 15, 1946, exclusive of unentered memos., but she is not sure. However, no memos. after April 15 were entered [1097-1102]. Money receipts were kept in the customers' files and bank accounts. Refunds were made by check after

April 15 and the contract was so marked [1112-27]. The receiver permitted a Mr. Minnick to remove those records to his home [1083].

*Surrender of Assets.* Each defendant scheduled all property, cash, bank accounts, assets and debts owned or owed by them [Pltf. Exs. 4, 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, 4-G, 4-H, 4-I and 4-J] as of bankruptcy and have concealed or withheld nothing from the receiver and trustee in bankruptcy [R. T. 1085-7, 1215-17]. All bank accounts were surrendered to the receiver [1123-73].

*The Buscemi Car Deals.* The car is the subject of alleged concealment by both defendants in Count I; of an alleged false schedule by the wife in Count II; and of alleged false swearing by the husband in Count III. The entire evidence concerning said car as to all of said counts is embraced in the testimony of *John Buscemi* [R. T. 360, 419, 436, 453, 581-2], *Lena Buscemi* [R. T. 589, 596, 610], *G. B. Kellogg* [R. T. 74, 623, 633, 638], *Clarence E. Palm* [R. T. 961, 970, 975, 976], *Louis Stroh* [R. T. 980, 1009, 1055], *Amelia E. Noell* [R. T. 1062, 1090, 1118, 1165, 1172] and *James A. Noell* [R. T. 1174, 1217]; and *Plaintiff's Exhibits* 5, 6, 7, 38-A, 38-B, 38-C, 42, 62, 65, 69, 70, 70-A, 70-B, 78, 82, 83, 84, 85, 86, 88, 89; *Defendants' Exhibits* C, D, E.

*Foreword:* Without arguing the evidence here, note that under Count II the wife is charged with falsely swearing that she did not own the car, as of bankruptcy, and under Count III the husband is charged with falsely testifying that she sold it to Buscemi and did not own it,

as of bankruptcy. Plaintiff's theory was that after said sale, Buscemi agreed to re-transfer the car to the wife.

That depended entirely upon the evasive, incoherent, gibberish of the self-confessed perjurer, John Buscemi, and his spouse, Lena, whose leaping and loping from one contradiction to another did not accredit their tutelage to ring-master Kirk until defense counsel compelled them to grudgingly admit that between their contrary testimony in the Bankruptcy Court and this trial, it required over 100 lessons for them to learn what pleased the maestro for them to say when, where and how to say it. As neither of them has been indicted as accomplices, accessories or conspirators to the offenses in which they could not have implicated defendants, without implicating themselves, it is assumed that the lords of bankruptcy looked upon their handiwork and found it good notwithstanding that John found more difficulty in remembering his lines after the judge banished Lena from the forum for wig-wagging to him while he was in the witness box [543].

When another Ananais and Saphira were hailed before Peter during the pentecostal interlude for cheating their fellows and lying before God, they were wound up, carried away and buried (*Acts*, 4, 5). It is tragic that their reincarnation in this generation should be rewarded by the approval of a system of justice whose leading sale's talk to the dubious aborigines is its enlightenment. Perhaps they are not blind enough to miss the same mythology in new raiment that has plagued them for centuries and so decline to substitute bewitching formulas for unadulterated witchery (see, Frazer in *The Golden Bough*, and Cassere in *The Myth of the State*).

PLAINTIFF'S EVIDENCE.

John Buscemi [360], who does not read or write English, testified on direct that he was in the chicken business and in May, 1946, also in the taxi business; that he bought lumber from defendants for three houses and one carload of lumber, which latter he paid for by check for \$2,050.00 [Pltf. Exs. 62, 65; 365].

In May, 1946, he bought a 1941 4-door Chevrolet sedan from defendant wife in the office of his lawyer (Macbeth) for which he gave her his check for \$846.00 [Pltf. Ex. 69]. "*. . . You know, I wanted to buy the car, because at the time I thought it was a bargain, \$846.00*" [369]. She and he then and there signed the pink slip for the car [367-72]. Leaving Macbeth's office, she said, "*'What am I going to do now? I haven't got no car.'* I said, '*Mrs. Noell, you feel that way, you think I got a bargain, there is the car back. I don't want the car. You done me some favors. Now I don't want the—You do that, O. K.'* She says, '*I bring the money right back to you*'" [R. T. 372].

*Note: She then had his check in her possession and the pink slip could not have reached Sacramento for the transfer in that interval of a few minutes!*

*The foregoing is the last participation which defendant wife is shown to have in the use of, or any transaction concerning, said car. Then follows:*

"Q. Well, did she give you the money back? A. He did \* \* \* Mr. Noell" [372, 418].

About 3 days later, defendant husband delivered to him near his house \$846.00 in cash in an envelope, saying, "Here is the money, \$846.00," "It is all there, Johnny," drove out, and which money Buscemi handed to his wife



without counting it and which she banked, he “guessed.” (*Note, witness does not testify that defendant said the money was for the car or what it was for* (see his cross-examination and James A. Noell, *post*).) [373-4]. The car was used by the husband, not the witness [375], but kept at the latter’s taxi stand [420-1].

The pink slip was in Buscemi’s name and the car was insured in his name, and he paid the premium which the husband repaid him “right then” in the sum of \$55.00 [375-7].

While the car was driven by one Stroh, employed by witness, it was damaged and witness paid the repair bill by check for \$483.85 [Pltf. Ex. 70; 377-80]. Thereafter he received and banked the insurance company’s check for the damage [380-1]. *doesn’t remember giving Noell any of that money* [433-6].

The witness then rambled on about Mr. Noell building the former’s house and buying some material therefor and paying him the “difference” out of the check proceeds [381-4]. *Comment: In other words, Buscemi is indebted to Noell for the building and for the insurance proceeds, yet he says that he merely paid Noell the “difference” between the two amounts!*

On June 29, 1946, he executed a written authorization [Pltf. Ex. 70] to enable defendant husband to obtain delivery of the car from the repair man “and give him this car to use until my return from Detroit, Michigan, which return I expect to be on or about the 1st day of August, 1946” [384-6].

In November, 1946, he sold the car to Palm, introduced to him by defendant husband, who accompanied them to the bank where witness was paid \$1,400.00 in cash by the buyer, whereupon they went around the corner and Noell



“lend me money—to buy turkeys, about \$1,000.00,” which witness repaid (partly by check and cash) a month or two after the holidays. December 13, 1946, his stenographer drew a check for \$1,000.00 “cash” [Pltf. Ex. 70] which witness cashed and gave to Mr. Noel [R. T. 422-33].

*Note:* Buscemi never produced the check for the balance of the \$1,400.00 which he testified he gave to repay Noell on the latter’s loan from the car sale and Exhibit “70” does not indicate what the check was drawn for other than “cash.”

*Cross-Examination:* After he built three houses and found difficulty in obtaining lumber, he operated a taxi cab business in Rosemead with three cars besides his personal Chrysler [436-44], wherein he used the car purchased from Mrs. Noell [507] and which Chrysler he frequently loaned to Noell after buying the Chevrolet [443-4].

He wanted to buy the Chevrolet from her, had his lawyer check the price and prepare the transfer papers and witness delivered to her the \$846.00 check [Ex. 69]; there [444-6]. He had previously bought three cars in California and knew that in order to show his ownership he had to get the “pink slip” and when Mrs. Noell signed it over to him [Pltf. Ex. 38-A] that he owned the Chevrolet; and if he transferred it he had to sign the “pink slip” [453-7]. He signed no “pink slip” for such transfer until his sale to Palm on November 19, 1946 [Pltf. Exs. 38-B and 38-C]. Exhibit 38-A was signed by Mrs. Noell and witness in said lawyer’s office, so that the car could be transferred to him and for which a new pink slip, Exhibit “38-B” was issued to him and which he later signed over to Palm at the bank [458-68] where

he also signed and had to sign his bill of sale to Palm to sell him the car [Ex. 70-A] and who paid him \$1,425.00 in currency. He signed no "pink slip" between Exhibits 38-A and 38-B for the Chevrolet [474-88].

His wife attended his "insurance agent" and with her received a policy from Hartford Accident & Indemnity Co. and Hartford Fire Insurance Co., dated May 21, 1946, insuring them against personal and property damage and public liability on the Chevrolet referred to in Exhibits 38-A and 38-B [Ex. 78; 468-71]

Witness Stroh, while employed by him, was in an accident with the Chevrolet, which was repaired by Allen A. Couch of Uplands Garage for which repairs Buscemi issued his check No. 81 June 29, 1946 of First State Bank of Rosemead, for \$483.85 [Ex. 70-B] and reported said accident to the police. As he was leaving for Detroit and the amount of the repairs was unknown, he signed the check in blank and left it and written authorization to obtain the car with James A. Noell [Ex. 70; 488-94]. Within one month he returned home and received the insurer's check which he banked [520-3].

*Impeachment:* He talked to Kirk about 100 times after first testifying in the Bankruptcy Court [494-8].

They didn't drive to Macbeth's office in his Buick and then pick up the Chevrolet [500-1] but he admits testifying in the Bankruptcy Court on April 22, 1947, that they drove in his car and then picked up the Chevrolet and thereafter witness loaned Noell the Chrysler and Buick to drive. On June 12, 1946, he testified that he gave Mrs. Noell the \$846.00 in his home for the car which he "took away with him" and got the transfer papers. The car was used by his employee, Stroh [507-16].

On April 22, 1947, he testified before the Bankruptcy Court that about one week after obtaining the Chevrolet he used it for one week in his taxi business and explained that it was during a strike when James A. Noell borrowed his Buick [505-7].

He never received other than the one envelope from Noell, as testified on direct [524] but admitted that upon buying a car of lumber from him on May 9, 1946 [Ex. 70] the latter delivered an *envelope* with bill of lading, etc. therefor [524-30]. (*Note:* Buscemi issued his check which was deposited May 1, 1946) [Ex. 5; R. T. 1122].

He admitted that in testifying in the Bankruptcy Court on June 12, 1946 (*supra*) he said nothing about receiving any money back from Mr. or Mrs. Noell but lied about it; that thereafter he had at least 25 meetings with Kirk and on April 1, 1947, he appeared before another bankruptcy referee in the absence of defendants and their counsel and testified that on May 13, he received money from Noell which he gave to his wife; that he recalled nothing being said by Mr. or Mrs. Noell [531-42].

He admitted not testifying in the Bankruptcy Court that Noell handed him \$1,000.00 of the \$1,425.00 Palm payment until he heard his wife testify that he brought it home and showed it to her and then banked it. He had previously testified that Noell received all of the payment. His wife also testified in the Bankruptcy Court that her husband received all of the \$1,425.00, did not know what he did with it, and when she told the Noells about Kirk interviewing them that they had "nothing to worry about, so long as you told the truth" [542-59].

*Redirect* [560]. Before testifying in the Bankruptcy Court, Noell told him to testify that the car was his, that he needed it in his taxi business [561-3].

In Macbeth's office when he promised Mrs. Noell the car back for the money, he added:

*"I give her the money back so I can have the car back"* [565:5-6].

When Stroh was building Buscemi's house, Noell was there and bought "stuff, everything for the house." They both used the Chevrolet and Buick. He left a check signed in blank with Noell [Ex. 70-B] to pay for the repairs of the car and of which Noell said, "Whatever it is, then I pay you back." (*Note: Witness filed and collected an insurance claim for this expense with Noell's assistance and kept the money. Noell may have told Buscemi in effect that he would be reimbursed though not with Noell's personal funds*) [R. T. 565-7].

After he first testified in Bankruptcy Court, he first talked to Kirk [568-72].

He banked the insurance check for the car damage and then *"I paid the money back, what I owed him (Mr. Noell) for the work he had done and all that stuff, I paid him"* [581-2].

*Recross* [582]. He accompanied Stroh and Noell to the police to report Stroh's accident and represented himself as owner of the car [586-8].

*Comment:* Note (1) that Buscemi received and retained title and possession of the Chevrolet from its purchase from Mrs. Noell to his sale thereof to Palm six months later; (2) that no terms of re-sale from Mrs. Noell to Buscemi were ever agreed upon; (3) that the alleged and disputed delivery of money to Buscemi three days thereafter was by defendant husband and not by the wife *with no evidence as to what it was for and which*



*was not attended by any transfer of title or possession;* (4) that Buscemi received and retained the entire proceeds of the insurance claim under the policy issued to him; (5) that he is falsified by his prior testimony that Noell loaned him \$1,000.00 from the sale of the car to Palm and by every other witness and document on the subject.

Lena Buscemi [589] testified that in May, 1946, Mr. Noell was in front of their place in a car when he gave Mr. Buscemi an envelope which the latter gave her and which she took to the First State Bank of Rosemead, counted the money therein and filled out a deposit slip [Ex. 6] and deposited \$846.00 [590-3].

She does not recall seeing the insurance policy [Ex. 78] before [593].

About March 23, 1947, Mr. Noell visited her when she told him that her husband told Kirk the money was returned after the sale of the car. Noell said, "that is bad, he shouldn't have done that—that makes it bad for me and for Johnny too—Johnny can go to jail for that." She said, "Well, if Johnny has jail coming that is all right." He said, "He won't get in it, though, because if I got him in it, I will get him out. I have to go see my lawyer because that's bad" [594-6].

*Cross-Examination* [596]. She first talked to Kirk in July, 1946, and last about 1½ months ago and did not recall going to the Rosemead Bank until he told her and "for that reason" now claims she did [596-9].

She admitted testifying in the Bankruptcy Court that defendants told her to tell the truth and that she first



testified before the referee that her husband told her nothing about selling the car for \$1400.00 and later testified that he did tell her he sold it for \$1400.00 and showed her a \$1,000.00 bill and was "going to deposit it in the bank," but she didn't know what he did.

*"Q. Were you telling the truth at that time when you gave the answers to the matters that I have just pointed out to you as appearing in the transcript?"*

*A. I don't know" [602-610].*

G. B. Kellogg, Vice-President of the First State Bank of Rosemead, testified on direct [623], produced deposit slips and ledger account of Lena Buscemi [Ex. 82]; ledger card and deposit slips of account of John and Lena Buscemi [Ex. 83]; three deposit slips and ledger sheet of Lena [Ex. 84] of John [Ex. 85], one of Lena [Ex. 86]; and other deposit tickets referred to in connection with Exhibit 7; photostat of ledger sheet of Lena's account [Ex. 88]. From May to December, 1946, said depositors had the foregoing accounts. Lena's account was opened July 10, 1945, and on November 28, 1945, converted to a joint account with John [Ex. 89; R. T. 623-33].

*Cross-Examination [634].* He produced in the foregoing all the deposit tickets of all the Buscemi accounts from May until December, 1946, which show no deposit by either of them of \$1,000.00, \$1,400.00 or \$1,425.00 between November 19, 1946, and December 20, 1946 [R. T. 636-7].

DEFENDANTS' EVIDENCE.

*Clarence E. Palm* testified on direct [961] that in November, 1946, he first met James A. Noell, who told him the Chevrolet was "for sale" with a new \$100.00 paint job and five new tires, but it belonged to John Buscemi with whom he would have to talk. They went to the latter's chicken house at 48th and Vermont and Buscemi said he would have more money but would sell it. Witness wanted a banker to examine the papers so the three went across the street to the Bank of America, where Mr. Tweedy prepared and Buscemi signed a bill of sale [Ex. 70-A] after Buscemi and witness signed and delivered the pink slip [Ex. 38-B]. Witness then handed Buscemi a \$1,000.00 bill, four \$100.00 bills and \$25.00. Thereafter he received a new certificate of ownership [Ex. 38-C; R. T. 961-9].

Witness arrived in the city two days before and he asked Mr. Noell to drive him out where he could find his way home. The three departed the bank together, Buscemi going to his chicken house and Noell and witness driving to Inglewood. Noell was not out of his presence after the \$1,425.00 was delivered to Buscemi and did not go behind the bank with the latter nor hand him any part of the \$1,425.00 [969-70].

*Cross-Examination* [970]. Witness met Noell while looking for a used car sale and saw the "for sale" sign on the Chevrolet for \$1,550.00. He offered \$1,425.00. Noell said, "Well, it is not my car. It belongs to a friend of mine over here and I will have to go and talk to him. If you want to go with me over there, I will drive you over." They went to Buscemi, where Noell talked to him privately for a few seconds when witness negotiated with him. He put the money in Buscemi's hands and Noell ob-

served a \$100.00 mistake, which was corrected. Buscemi placed the money in his pocket and witness never saw it thereafter [970-5].

*Redirect Examination.* Witness, Noell and Buscemi were together all of the time and under the former's observation until Buscemi left for the chicken house and witness and Noell left for Inglewood [975].

*Recross-Examination* [976]. Noell was never out of his sight and he observed Noell and Buscemi at all times until they broke up. Noell and Buscemi were not alone together after the money was paid [976-7].

*Louis Stroh* testified on direct [980] that he is a builder and carpenter and has known defendants since the spring of 1945; while working for Buscemi in May or June, 1946, his wife, Lena, produced Exhibit 38-A and asked him how to have the pink slip transferred and he advised her to mail it to the Motor Vehicle Department in Sacramento [997-8].

June 13, 1946, while so employed, he was driving the Chevrolet with Buscemi's permission and had an accident. The car was taken to the Uplands Garage for repairs and he took Buscemi, Noell and one Charley Guske to the police department where it was reported, a report prepared and signed in the presence of said persons [995-7, 998-1002; Deft. Ex. "B"].

J. D. Montgomery, Claims Adjuster for Hartford Accident & Indemnity Co. [Ex. "C"] sent for him to make an accident report, which he did after Buscemi handed him Montgomery's car [Ex. "C"] and the insurance policy [Ex. 78 for Ident., Deft. Ex. "D"] and asked him to take care of it, as Buscemi was going East. Witness took the policy to the Claims Adjuster [1003-9].

Besides being in his custody while employed by Buscemi, the latter exchanged it for a Chrysler to use in his taxi business during the street car strike in Los Angeles [1003].

*Cross-Examination* [1009]. After the car accident in June, 1946, when Buscemi went East, James A. Noell supervised the building of an apartment and bought some supplies for him. He saw Noell drive the Chevrolet several times before the accident and thereafter they changed cars occasionally [1028-30].

*Redirect Examination* [1055]. John Buscemi had the Uplands Police Department change its accident report to show the owner of the Chevrolet as "Rosemead Taxicab Company" instead of "John Buscemi," as originally typed. Buscemi's presence was necessary because the transfer from Mrs. Noell had not cleared the Department of Motor Vehicles [1057-8].

*Amelia E. Noell* [1062] defendant, testified in chief that the Chevrolet was her separate property wherein her husband and co-defendant, James, had no interest; that at her home in the presence of her husband, Buscemi said he wanted to buy said car and upon her asking the ceiling price, he invited them to the office of Mr. Macbeth, where they went and informed him of the proposed sale. The lawyer reported the ceiling price was \$845-6.00 for which Buscemi gave her his check and she indorsed and delivered to him the pink slip and registration card [Ex. 38-A]. The same group then drove back to her home, where the Chevrolet was in the yard, and when she said to Buscemi, "I don't have any car now, and out in Monrovia it is hard to get around" he replied "Don't worry. You can use one of mine or you can call one of my taxis." He then drove away with



the Chevrolet and left her the Chrysler. He or anyone else did not then, nor at any time, state that the Chevrolet was hers or she could buy it back nor did she state that she would return his money, nor did she believe after transferring Exhibit 38-A that she had any interest in said car [R. T. 1064-8].

That she never was in bankruptcy before and was advised by counsel in preparing her petition and schedules; that she signed Schedules "F" and "G" in Exhibit "42," and then owned no vehicle or interest therein [1069-71].

That from the sale to Buscemi to the present moment she never handed anyone, including her husband, cash, check or otherwise, to be paid to Buscemi as a refund for the car [1071-2].

That she received Buscemi's check of May 9, 1946, for \$846.00 [Ex. 69] for the car and indorsed and cashed it the following Monday afternoon at the First State Bank of Rosemead upon which it was drawn; that none of said proceeds were delivered to Buscemi or anybody else [1072-3].

That at the time of bankruptcy, she withheld no property from the trustee [1086-7].

That she visited the Buscemis' to give a present to their granddaughter and learned that Kirk had repeatedly called upon them; she did not tell the Buscemis' to conceal the truth or lie but to state the fact [1088-90].

*Cross-Examination* [1090: 1155]. She received Buscemi's check [Ex. 69] on Saturday, May 11, 1946, but it may have been erroneously dated May 9, 1946; that they went to Macbeth's office for him to examine the papers and be sure she could sell the car and the lawyer said she could if it was not attached. The partnership business was attached May 13, 1946 [R. T. 1155-8].



She cashed Exhibit 69 and gave \$400.00 or \$600.00 to Mr. Noell to pay bills with [1160-1]. When Buscemi bought the Chevrolet he told her she could use any of his cars or taxis and the Noells did use the Chevrolet, Chrysler and Buick intermittently. Sometimes the borrowed car was kept over night at their home, if they were to use it the next day, otherwise it was returned to Buscemi [1161-4].

*Redirect* [1165]. In the conversation between the Noells and Buscemi concerning Kirk, Buscemi told Mr. Noell, "Well, if you tell me what you want me to say I will say it." Noell advised him to tell the truth [1164-5].

June 29, 1946, Buscemi executed the authorization to Noell to use the car in the former's absence [Ex. 70 for Ident., in evidence Deft. Ex. "E"; R. T. 1165-7].

*James A. Noell*, defendant, testified on direct [1174, 1188] that he never owned and was never promised an interest in the Chevrolet described in Exhibit 38-A. Its sale was first discussed two months before. He was present when his wife and Buscemi signed Exhibit 38-A on May 11, 1946, about noon, in the office of Mr. Macbeth, attorney for Buscemi, and which attorney witness did not theretofore know. They wanted the ceiling price which Macbeth reported as \$846.00 and approved the transfer of said pink slip. Thereupon Mrs. Noell and Buscemi exchanged pink slip and his check for the price [1189-91].

Buscemi in his Chrysler drove to Macbeth's office from and back to their home in Monrovia. After the transfer, Mrs. Noell lamented her lack of a car and Buscemi replied that he had several and a taxi which she could use. Nothing was ever said or intimated about her returning the purchase price or to be considered as owning the car. It had not been attached [1191-3].

When they returned home each defendant delivered a set of car keys to Buscemi, who drove away with the Chevrolet after saying that they could use the Chrysler which they had for two or three days. Thereafter they nearly always had the use of a Buscemi car of which he did most of the driving [1193-4]. After the sale he never handed Buscemi an envelope containing money nor refund him any money for an interest in the Chevrolet [1211-12].

He accompanied Buscemi, Stroh and Guske after the former informed him, to the Uplands Police Department, where Buscemi and Stroh reported an accident involving said Chevrolet while driven by Stroh. He next saw the Chevrolet when it was delivered to him after Buscemi's written report of June 29, 1946 [Deft. Ex. "E"] and check for \$483.85 for repairs [Ex. 70-B] as Buscemi was departing for Detroit, Michigan. Witness contributed no part of this repair expense and refunded no money to Buscemi on account thereof, nor did either defendant procure or pay for the Buscemi car and insurance policy [Deft. Ex. "D"] or pay any part of the premium and has done no business with the insurer for many years [1194-9].

In November, 1946, Buscemi had him attach a "For Sale" sign with the price thereon to the car and while parked on Figueroa Street in Los Angeles, Clarence E. Palm, a stranger, inquired about buying it. He demonstrated the car, Palm offered \$1,425.00, and witness told him that the car belonged to Buscemi, to whose chicken house they went on 48th and Vermont. Witness told Buscemi that Palm offered \$1,425.00 for the car and Buscemi said it is not enough, but agreed. Upon Palm's suggestion, they went across the street to the Bank of

America. Buscemi had the pink slip in his pocket and produced it. Mr. Tweedy in the bank prepared the bill of sale [Ex. 70-A] which Buscemi signed together with the pink slip, which Palm left at the bank to have transferred through the Vehicle Department to him. Palm delivered to Buscemi \$1,425.00 in currency, including a \$1,000.00 bill, which the latter placed in his pocket. None of this money was in witness's hands at any time [1199-1207].

They all left the bank and walked across the street together. Witness and Buscemi did not go around to the side or behind the bank. Witness already had promised to drive Palm, who was a stranger in Los Angeles, to his home in Inglewood. He drove him until Palm got his bearings and then returned via street car and has not since seen the Chevrolet [1207-10].

Buscemi never gave him any part of the proceeds of said sale of the Chevrolet [1209].

His testimony before Bankruptcy Referee Brink concerning his wife's sale and transfer of the Chevrolet to Buscemi and the latter's ownership thereof is true and the reporter's version of said testimony, rather than the indictment, is correct (Count III). He surrendered all property except exemptions to the bankruptcy receiver and his bankruptcy schedules are true [1212-17].

There was no cross-examination concerning the car.

*Comment:* The foregoing summarizes all pertinent evidence concerning the car referred to in Counts I, II and III. The testimony of perjurers, John and Lena Buscemi, is so contradictory and inherently incredible as to be

inadequate for a rational suspicion. But, as noted in Point III, and in the preceding analysis of their testimony, there is no basis for the assumption that the parties ever contemplated, much less effected, a resale of the car from Buscemi to Mrs. Noell or her husband. Conversely, the defendants are corroborated by distinterested witnesses and the official reports in every material aspect of their testimony. The question is not one of conflict but of *no evidence to support any count of the indictment concerning the car.*





No. 11989

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JAMES A. NOELL and AMELIA E. NOELL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

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### STATUTES

United States Code Annotated, Title 11, Sec. 52(b).....	1
United States Code, Title 11, Sec. 52(b)(1), (2).....	2
United States Code, Title 28, Sec. 41(19).....	1
United States Code, Title 28, Sec. 225(a), (c).....	1
United States Code, Title 28, Sec. 371(6).....	1



No. 11989

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JAMES A. NOELL and AMELIA E. NOELL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### JURISDICTIONAL STATEMENT.

Appellants were indicted for concealing assets in bankruptcy and making false oaths in connection therewith (11 U. S. C. A., Sec. 52(b)). The District Court had jurisdiction under United States Code, Title 28, Section 41(19) and Section 371(6). The offenses charged were committed in the Southern District of California [Tr. 2-8].<sup>1</sup> Judgment was entered on July 12, 1948 [Tr. 22-26]. Notice of appeal was filed July 19, 1948 [Tr. 27-28]. This Court has jurisdiction under United States Code, Title 28, Section 225(a) and (c), which treat of the jurisdiction of courts of appeal.

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<sup>1</sup>The references preceded by "Tr." are to the printed Transcript of Record and those preceded by "R. T." are to typewritten Reporter's Transcript while those preceded by "A. B." are to appellants' brief.

## OUTLINE OF INDICTMENT.

### Count One.

11 U. S. C., Sec. 52(b)(1).

#### CONCEALMENT OF ASSETS.

Commencing on May 22, 1946, to date of indictment (January 28, 1948) defendants concealed from the Receiver and Trustee a portion of the assets of said individuals and co-partnership, to wit, \$25,000 and one 1941 Chevrolet Tudor Sedan.

### Count Two.

11 U. S. C., Sec. 52(b)(2).

#### FALSE OATH—AMELIA E. NOELL.

On May 22, 1946, Amelia E. Noell did make false oath in bankruptcy proceedings, to wit, in Schedules F and G (wherein she stated that she had no automobile or other vehicles and no property in reversion, etc.), which was false because she had a property interest in a 1941 Chevrolet Tudor Sedan automobile.

### Count Three.

11 U. S. C., Sec. 52(b)(2).

#### FALSE OATH—JAMES A. NOELL.

On June 3, 1946, James A. Noell did make a false oath in bankruptcy proceedings before Referee Brink, to wit, that this car was Buscemi's, which was false because he well knew his wife did have an interest in said 1941 Chevrolet and had not made a bona fide sale to John Buscemi.



## STATEMENT OF FACTS.

### Preliminary.

By stipulation [R. T. 227], for the purposes of trial, all three estates, *i. e.*, the bankruptcy estates of the defendant James A. Noell, of the defendant Amelia E. Noell (husband and wife) and the copartnership, "Pacific Firm-Built," between them, were treated as one estate.

Defendants individually and as copartners filed their voluntary petition in bankruptcy on May 22, 1946 [Ex. 4], claiming composite assets of \$53,682.96. By amended partnership schedule [Ex. 4b], filed 34 days later (June 25, 1946), an additional claimed asset of a \$15,000 chose in action against one William Scheules was for the first time mentioned. Thus the total claimed assets were \$68,682.96 against claimed liabilities of \$61,305.47, which in truth amounted to only \$54,345.47 [R. T. 786-788].

In appendix attached are photographs of three charts in evidence each portraying a summary of the findings of the expert witness George M. Kirk, Jr., an accountant and Special Agent of the Federal Bureau of Investigation, which are largely self-explanatory.

The chart entitled "Schedules Filed for the Partnership and by James A. and Amelia E. Noell, Individually," is Exhibit 40 in evidence [R. T. 926] and represents the schedules as ultimately and finally amended. The item of secured claims of \$6,960 under liabilities in the schedules of James A. Noell was a duplication [R. T. 787] with the

result that the total liabilities under the three schedules is properly indicated on Exhibit 40 in longhand as \$54,-345.47 [R. T. 788].

The chart entitled "Receipts and Disbursements of the Partnership and James A. and Amelia E. Noell, Individually, October 20, 1945 to May 22, 1946," is Exhibit 58. It comprehends the over-all total duration of the partnership from its inception, October 20, 1945 [R. T. 818, 1063; A. B. Appendix 3], to the date of the filing of the voluntary petition in bankruptcy on May 22, 1946 [Ex. 4].

Exhibit 58 shows that, over and above the total legitimate miscellaneous aggregate withdrawals of over \$3,200 by appellants over the seven months' life of their business copartnership, they withdrew and received additionally over \$32,000.00 which cannot be accounted for by any files, books or records of the copartnership or of the appellants.

The chart entitled "Cash Withdrawals by James A. and Amelia E. Noell," is Exhibit 57. It shows that appellants withdrew *over* \$28,500.00 of the unaccounted for cash referred to in Exhibit 58, within a period of 56 days prior to their filing their voluntary petition in bankruptcy. Exhibit 57 shows that of the \$28,511.67 last minute withdrawals, the appellant husband withdrew \$8,800.00 and the appellant wife withdrew \$19,711.67 [Ex. 57].

## **Facts Most Favorable to the Government.**

Appellants now claim:

“There can be no doubt from Mr. Kirk’s summary and charts [Pltf. Exs. 57, 58] that, except for the cash contributions and expenditures by Mrs. Noell for the partnership, it was insolvent in March, 1946” [A. B. Appendix p. 6].

Nevertheless, between March 28, 1946, and May 20, 1946, defendants withdrew \$28,511.67 [Ex. 57] from six banks and not only this sum but the total sum of \$32,011.67 is wholly unaccounted for either by any books, files, records or credible evidence whatsoever.

Aside from any profits which may have been made by defendants in the sale of real estate, the partnership, in the operation of the partnership business alone, according to the books and records of the partnership, made a net profit of \$1,173.75 in the seven months of its existence [R. T. 818].

There is nothing in the files, books and records of the partnership to show or indicate that \$15,000.00, or \$17,000.00 or any other sum was paid to any William Scheules [R. T. 892-897]. The non-existence of any such person is indicated to some extent by the return of correspondence addressed to him at Roseburg, Oregon (address given in defendants’ schedules), which was returned marked “Unknown” [R. T. 187]. The postmaster at Roseburg, Oregon, testified he had never become acquainted with or run across any William Scheules [R. T.

354] and had made inquiry for such a person in Roseburg, Oregon, but had been unable to find anyone who knew any William Scheules [R. T. 359].

The appellants' lumber yard completely ceased operations on May 13, 1946 [R. T. 1144], when an attachment was levied against the partnership business and buildings [R. T. 1158].

On Saturday, May 11, 1946 [R. T. 1156-1157], appellants were engaged in a purported sale of the Chevrolet automobile to John Buscemi [R. T. 368]. Buscemi gave appellant wife his check for \$846 [Pltf. Ex. 69]. Appellant wife signed over pink slip [R. T. 367-372] and said she would like to have the car back [R. T. 106] and would repay Buscemi the \$846 [R. T. 372] and three days later (about the date of the attachment) the appellant husband paid back the \$846 to Buscemi in cash [R. T. 372]. Buscemi's wife deposited this \$846 cash reimbursement [Ex. 6] on May 13, 1946 [R. T. 590-593], the same day appellant wife cashed the \$846 check.

The appellant husband sold the car subsequently for \$1425 at which time he allowed Buscemi to have \$1,000 thereof [R. T. 429] which Buscemi paid back [Ex. 70] after Thanksgiving, *i. e.*, on December 13, 1946 [R. T. 432]. Only the evidence most favorable to the Government will be considered on appeal.

*Hemphill v. United States* (C. A. 9), 120 F. 2d 115, 117, cert. den. 314 U. S. 627.

## ARGUMENT.

### Summary.

In addition to the automobile, appellants are charged (Count One) with concealing \$25,000. The evidence shows \$32,011.67 unaccounted for [Ex. 58], of which \$28,511.67 was cash withdrawn by appellants from six banks within about seven weeks before they filed their voluntary petition in bankruptcy [Ex. 57].

Appellants, black market operators [R. T. 1218], collaborated in the purported sale of the car to their friend, John Buscemi, for a “ceiling” price of \$846 [R. T. 368] with the friend’s promise to sell it back at same price [R. T. 372] and three days later the price was paid back to Buscemi in cash by appellant husband [R. T. 372] and appellants continued to use the car [R. T. 1161-1163] and ultimately sold it for \$1,425 [R. T. 429-432, 546-547].

Count II charges appellant Amelia E. Noell with a false oath in her bankruptcy schedule: that she had no automobile nor any interest therein.

Count III charges appellant husband with a false oath in his testimony before the Referee in Bankruptcy wherein he swore that the car was Buscemi’s.



## Questions Presented.

Appellants' brief contains no specification of errors unless their "Statement of Points on Which Appellants Intend to Rely on Appeal" be treated and considered as such. In this latter event it should be noted that no effort has been made to comply with or observe Rule 20 of the Rules of Court.

Appellants' 20 points, however, are treated in eleven divisions and to avoid further confusion we will discuss each point in the order in which they are discussed in appellants' brief.

### I.

#### **The Exhibits Were Not Withheld From the Jury's Perception.**

Appellants complain in their Point VII that Exhibits 40, 57 and 58 were exhibited to the jury. These exhibits were summaries of the greater bulk of the exhibits.

No objection was made in the trial court that the exhibits were kept from the jury for the very good reason that they were not withheld.

It would be tedious and unnecessary to pursue this point extensively. It, perhaps, is sufficient to observe that the record shows that appellants' counsel in his argument showed the jury such of the exhibits as he cared to show [R. T. 1274-1275] and the Government's counsel did likewise [R. T. 1133].

## II.

### There Is Substantial Evidence That Appellants, Both of Them, Concealed Cash as Alleged in Count I.

Appellants never expended over \$400 per month for household expenses [R. T. 1171]. Yet in a period of about seven weeks before appellants filed their voluntary petition in bankruptcy, they withdrew in cash \$28,511.67 from their six bank accounts [Ex. 57]. The appellant husband withdrew \$8,800 and appellant wife withdrew \$19,711.67 [R. T. 295]. Neither appellants, nor their files, books or records could account for the disposition of these funds.

Appellants aver that they delivered “to the receiver all memoranda of transactions not posted in their books” (A. B. 14). Exhibits 57 and 58 show, by interlineation, the exhibits upon which they (the charts or summaries) were based and made. From this it is apparent that the expert accountant, Kirk, was comprehensive in his examination of all files, papers, books and records turned over to the Receiver and Trustee by appellants.

Appellants urge, to use their language, “the following fallacies” (A. B. 16):

“*First:* There is to be deducted the item of \$15,000.00 which defendant husband advanced to Scheules for the purchase of lumber in Oregon, and of which no record was made in the partnership books.”

Appellants are correct in identifying that as a *fallacy*. In the first place there is nothing in evidence to suggest

whether the *claimed* transfer of \$15,000.00 to the apparently fictitious "William Scheules" was an "advance," as appellants' brief suggests, or something else; there is nothing from which the court could determine whether it was "for the purchase of lumber," as appellants' brief also suggests, or something else. In fact the inquiry of appellant husband on cross-examination, "What did you give him the money for?" was never answered for the reason that the appellant husband claimed that the answer thereto would tend to incriminate him. There is evidence that there was no payment or advance or transfer of any funds whatsoever to Scheules; that Scheules was fictitious and non-existent [R. T. 354-359].

Appellants' next admittedly fallacious claim (A. B. 16) is that:

"In-so-far as joint concealment is concerned, there must be deducted from the cash receipts described by Mr. Kirk the proceeds from the wife's sales of separate property."

Appellee concedes that that claim is fallacious. Both appellants were in bankruptcy. Their combined unsecreted resources were insufficient to pay creditors [R. T. 228-229]. "The partnership was virtually destitute of cash months before the bankruptcy adjudication" (A. B. 15). Nevertheless \$8,800.00 of the \$28,511.67 last minute cash withdrawals was by appellant husband [Ex. 57] and appellant wife claims to have given her appellant husband substantial portions of the \$19,711.67, hastily withdrawn by her [R. T. 1129-1161].

Appellants' purported efforts to explain their dissipation or sequestration of the \$28,511.67 extracted from the six banks exemplifies, even in the cold record, an evasive attitude. Mrs. Noell's remarks in this connection are found in the typewritten reporter's transcript from page 1129 to page 1161. Mr. Noell's remarks more vividly to the same effect are found in the typewritten reporter's transcript from page 1175 to page 1188.

"The demeanor of an orally testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. \* \* \*"

*Broadcast Music Inc. v. Havana Madrid Restaurant Corp.*; ..... F. 2d ..... (17 L. W. 2588), decided May 27, 1949 by the Second Circuit.

### III.

#### **There Is Ample Evidence That Amelia E. Noell Concealed the Car as Alleged in Count I.**

In addition to that which has been pointed out above, it is pertinent to note that:

*First*, it is strange that appellants, admittedly engaged in black-market activities, should sell the car when “creditors’ suits were pending and threatened” [R. T. 1101, 1144-6 (Ex. 46), 1030-40; A. B. Appendix 3-4] for only “ceiling” price and no more.

*Second*, appellants continued to drive the car after the purported sale using the car as their own, even taking a trip in it to Reno [R. T. 1161-1163]. Three days later the “ceiling” price was paid back to the buyer in cash [R. T. 372].

*Third*, appellant husband went out on Figueroa Street to sell the car [R. T. 1200-1210] and received \$1,425.00 therefor at a bona fide sale [R. T. 429-432, 546-547].

### IV.

#### **There Is Ample Evidence That Appellant Husband Concealed the Car.**

In addition to that which has been pointed out above, it should also be remembered that the appellant husband was with his wife at the *purported* sale of the car to John Buscemi at the “ceiling” price of \$846 and three days later returned the \$846 to John Buscemi in cash [R. T. 372], took care of all details, *i. e.*, insurance [R. T. 376-377] and accident report [R. T. 377], and ultimately sold the



car for the price of \$1,425.00 and collected the money therefor [R. T. 429-432].

As discussed, *infra* (Point VI), appellant under oath swore that the car was “Mr. Buscemi’s” car before the Referee in Bankruptcy [R. T. 59-60].

## V.

### **There Is Ample Evidence That Appellant Wife Swore Falsely That She Owned No Interest in the Car.**

In addition to that which has been pointed out above, the appellant wife made the arrangements [R. T. 565] at the pseudo “ceiling” price sale for the reacquisition of equitable ownership three days later [R. T. 372]. Within the three days the accommodation vendee, John Buscemi, was reimbursed, *i. e.*, he received back the \$846.00 in cash [R. T. 372], and retained merely the naked legal title as a trustee.

## VI.

### **(1) Count III Does Allege a False Oath.**

In succinct substance, insofar as is here pertinent, Count III alleges that appellant husband

“did knowingly and fraudulently make a false oath in said bankruptcy proceedings \* \* \* and \* \* \* gave the following testimony:”

*Note:* In substance the gravamen of the false testimony set out in the indictment is as follows:

John Buscemi is the owner of the car.

It is Mr. Buscemi’s car.

The indictment, Count III, then proceeds to aver that appellant husband's foregoing testimony

was false as the appellant husband then and there well knew in that his [appellant] wife did have an interest in said car and had not made a bona fide sale thereof to John Buscemi.

**(2) It Is Established by Ample Evidence That the Testimony of Appellant Husband Before the Bankruptcy Court With Respect to the Car Was False.**

The appellant husband testified under oath that John Buscemi "is the owner" of the car. "It was in my possession about a week ago" (*i. e.*, about May 27, 1946 [R. T. 54-60]). "But it was Mr. Buscemi's car then" [R. T. 60:11-14; 61:14-16]. When the appellant husband so testified he knew that there had been no bona fide sale to Buscemi and that on May 13, 1946, he had returned the \$846 to Buscemi. Appellant husband knew that his return of the \$846 to Buscemi was to revest equitable title in the seller both as a matter of law as well as pursuant to clandestine agreement [R. T. 565].

Such equitable ownership is a substantial legal interest in property which the evidence demonstrates was carefully secreted and appellants sought to further hide the transaction by false oaths.

VII.

**There Was No Error in the Admission of Exhibits 40, 57 and 58 (Accountant's Charts) Into Evidence.**

Appellants are in error in their assertion that Plaintiff's Exhibit 40 for identification was never received in evidence (A. B. 52). It was received in evidence as Plaintiff's Exhibit 40 [R. T. 926].

Every record upon which Plaintiff's Exhibits 40, 57 and 58 are based is in evidence. Said Exhibits 40, 57 and 58 on their respective faces show, by interlineation, the other exhibits in evidence upon which each item of said Exhibits 40, 57 and 58 is based.

Appellants complain that the expert, Accountant Kirk, expressed opinions and made summaries based upon "incomplete" records. It is true that appellants made as few records of their crimes as possible. However, the accountant, Kirk, based his investigation and summaries upon all the files, papers, books and records of the appellants.

There is nothing in the appellants' records which even so much as indicates that any part of the \$32,011.67 unaccounted for [Ex. 58] was paid to this, probably non-existent and wholly fictitious, William Scheules [R. T. 892].

There is nothing in appellants' records to indicate that any of the \$28,511.67 [Ex. 57] was used to pay or advance to William Scheules any sum whatsoever [R. T. 897].

There is nothing in appellants' records to show any disposition of the cash withdrawal items listed on Exhibit 57 [R. T. 897] except that \$8,800.00 was withdrawn by appellant husband and \$19,711.67 was withdrawn by appellant wife.

The first mention or record of the Scheules matter is in the bankruptcy schedules. It is most significant, too, that the Scheules matter was not mentioned in the original schedules [Ex. 4] filed May 22, 1946. This substantial \$15,000.00 (or \$17,000.00) item was completely omitted in the original schedules.

It was not until June 25, 1946, that appellants filed the amended schedule [Ex. 4b] setting up this \$15,000.00 item for the first time. Upon his cross-examination, appellant husband claimed it was even more than \$15,000.00, *i. e.*, \$17,000.00 [R. T. 1219]. Appellant husband said it would tend to incriminate him to explain what this 15 or 17 thousand dollar payment or advance or what-not was for.

It's not surprising and altogether proper that the accountant should not have included the asserted Scheules transactions in his summaries. The transaction was not in the files, papers, book or records of appellants. The transaction never occurred. The claim that it did occur was one of appellants' afterthoughts, a defense mechanism.

Appellants' assertion (A. B. 55-56) that Accountant Kirk "admitted that he erred in charging" the \$15,000.00 Scheules item to appellants as receipts unaccounted for is a grossly incorrect statement [R. T. 870]. (The complete record in the reporter's typewritten transcript is encompassed by pages 865 to 872.)

Equally fallacious is appellants' complaint that Exhibit 57 charges appellants jointly with receipt of \$16,636.58 from the sales of appellant wife's separate property in arriving at the total amount of cash concealed. Appellants offer the ridiculous argument that the asserted \$16,636.58 is separate property of the wife and that it together with the asserted payment of \$15,000.00 (why not \$17,000.00?) to Scheules should be deducted from the \$32,011.67 [Ex. 58] to show that appellants only secreted about \$375 (or less).

The argument falls of its own weight. It makes little difference whose funds they were for the reason they should have been turned over to the proper authorities and not secreted. The assets of both partners were liable for the debts of the copartnership.

### VIII.

**The Court Did Not Err in Receiving Evidence of a Returned Envelope Addressed to Scheules or in Receiving the Testimony of the Postmaster on the Issue With Respect to William Scheules.**

In the amended partnership Schedule B-3 [Ex. 4b] appellants represented that William Scheules "gave his address as Roseburg, Oregon."

Regardless of what it may or may not have proved, it was not error to show that the Trustee's letter to William Scheules was returned marked "unknown." By the same token it was discreet to permit the postmaster at Roseburg to testify that he did not know William Scheules and had tried and had been unable to locate him.



IX.

**It Was Not Improper Cross-Examination or Misconduct for the Government to Ask Appellant Husband Whether He Gave \$15,000 to William Scheules and It Was Not Error for the Court to Determine Appellant Witness' Constitutional Rights After the Witness Declared in the Presence of the Jury That He Wished to Stand on His Constitutional Rights.**

On direct examination appellant witness' counsel asked him whether he withheld "any money, property \* \* \* or anything of value whatsoever from the receiver or trustee." Appellant James A. Noell gave a negative answer [R. T. 1215-1216].

The question on cross-examination, "Did you give \$15,000 to William Scheules?" was proper as within the scope of the direct examination and under the Government's contention that there was no such person, no such payment and no such credit or chose in action which appellants belatedly listed in the amended partnership bankruptcy schedule as an overlooked \$15,000 asset.

Finally, appellant husband on cross-examination was asked, "What did you give him the money for?" whereupon the court sustained appellant witness' claim of constitutional privilege against self-incrimination [R. T. 1224-1225].

The claim that it was a black market transaction was a wholly voluntary *claim* of appellant husband while on the witness stand. It is the Government's position that there was no such transaction and that the claim of privilege against self-incrimination, based on black market operations, was embraced to avoid exposure of the fictitious transaction which cross-examination threatened.

In truth the trial court was generous in sustaining the claim of privilege. The defendant witness was not entitled to the privilege.

“The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. \* \* \* His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.”

*Raffel v. United States* (1926), 271 U. S. 494, 496-497.

See also:

Cyc. Fed. Proc. (2nd Ed.), Vol. 9, Sec. 4323.

## X.

### Judgments of Imprisonment Were Proper and Involved No Denial of Due Process of Law.

Appellants complain of the recommendation of a “committee,” referred to by the Assistant United States Attorney. The recommendation was less severe than the judgment imposed. The court imposed an additional fine.

There is no showing in the record as to the composition of the committee complained of. It might discreetly be suggested, however, that the United States Attorney, in arriving at his recommendation to be given the court at the Trial Judge’s request, might well call into conference the Assistant who tried the case as well as the Chief of the Criminal Division of the office to the end that the most careful consideration be given the answer to the question frequently asked by trial judges, to wit, the question asked by the trial court in this case:

“What does the Government recommend?” [R. T. 1315.]

XI.

**Defendants Were Given the Fair and Impartial Trial  
Guaranteed by the Constitution.**

Appellants concede that:

“The trial judge enjoyed a prerogative which is denied appellate courts in that it was his [the trial court’s] duty to pass upon the credibility of witnesses and weigh the evidence.”

There is nothing in the record to even suggest that the Trial Judge was remiss in the exercise of that prerogative. On the contrary, at the time of the imposition of sentence the remarks of the Trial Judge demonstrate that he had analyzed the evidence and concurred in the jury’s verdict and notwithstanding the Government’s recommendation to the contrary assessed a \$5,000 fine as to each defendant [R. T. 1274-1323].

**Conclusion.**

No reversible error was committed by the Trial Judge. Appellants had a full and fair trial. The verdicts are fully supported by the evidence. The sentences were moderate and clearly justified. The Judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,

*United States Attorney;*

ERNEST A. TOLIN,

*Chief Assistant U. S.*

*Attorney;*

NORMAN W. NEUKOM,

*Assistant U. S. Attorney;*

WILLIAM L. BAUGH,

*Assistant U. S. Attorney,*

*Attorneys for Appellee.*

SCHEDULES FILED FOR THE PARTNERSHIP  
AND BY JAMES A. AND AMELIA E. NOELL, INDIVIDUALLY

PARTNERSHIP      JAMES A. NOELL      AMELIA E. NOELL

ASSETS

STOCK IN TRADE  
DEBTS DUE ON OPEN ACCOUNT  
(INCLUDES \$15,000.00 DUE  
FROM WILLIAM SCHEULES)  
DEPOSITS OF MONEY  
HOUSEHOLD GOODS  
REAL ESTATE  
(124 & 128 W. POMONA ST.,  
MONROVIA, CALIFORNIA)

\$10,500.00	\$	\$
15,738.00		
4,034.00	110.96	NONE
	100.00	200.00

38,000.00

TOTAL ASSETS

\$30,272.00	\$	210.96	\$ 38,200.00
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LIABILITIES

TAXES DUE  
UNSECURED CLAIMS  
UNSECURED CLAIM  
(BANK OF AMERICA LOAN  
ON PROPERTY LOCATED  
AT 124 W. POMONA ST. &  
128 W. POMONA ST.,  
MONROVIA, CALIFORNIA)  
UNSECURED CLAIMS

\$ 157.00	\$	\$
47,051.15		
6,960.00		6,960.00
177.32		

TOTAL LIABILITIES

\$47,208.15	\$	7,137.32	\$ 6,960.00
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# CASH WITHDRAWALS BY JAMES A. AND AMELIA E. NOELL

DATE	BANK ON WHICH DRAWN	PERSON RECEIVING FUNDS	FORM OF PAYMENT	AMOUNT
------	---------------------	------------------------	-----------------	--------

## MAY

20	BANK OF AMERICA, WEST ARCADIA	AMELIA E.	CASHIERS CHECK	\$ 399.48
13	BANK OF AMERICA, EAGLE ROCK	AMELIA E.	PERSONAL CHECK	271.30
10	BANK OF AMERICA, COLO-MENTOR	AMELIA E.	CASHIERS CHECK	443.55
10	BANK OF AMERICA, COLO-MENTOR	AMELIA E.	CASHIERS CHECK	800.00
10	FIRST STATE BANK, ROSEMEAD	JAMES A.	PERSONAL CHECK	600.00
10	BANK OF AMERICA, EAGLE ROCK	AMELIA E.	PERSONAL CHECK	500.00
4	BANK OF AMERICA, YORK-FIGUEROA	JAMES A.	PERSONAL CHECK	700.00
2	BANK OF AMERICA, M.O., PASADENA	AMELIA E.	PERSONAL CHECK	158.01
1	BANK OF AMERICA, EAGLE ROCK	AMELIA E.	PERSONAL CHECK	400.00

MAY TOTAL

\$ 4,272.34

## APRIL

26	BANK OF AMERICA, WEST ARCADIA	AMELIA E.	CASH	\$ 7,000.00
22	BANK OF AMERICA, COLO-MENTOR	JAMES A.	PARTNERSHIP CHECK	2,500.00
16	BANK OF AMERICA, M.O., PASADENA	AMELIA E.	PERSONAL CHECK	4,000.00
15	BANK OF AMERICA, COLO-MENTOR	AMELIA E.	CASHIERS CHECK	2,339.33
3	BANK OF AMERICA, EAGLE ROCK	AMELIA E.	PERSONAL CHECK	3,400.00

APRIL TOTAL

\$ 19,239.33

## MARCH

28	BANK OF AMERICA, M.O., PASADENA	JAMES A.	PERSONAL CHECK	\$ 5,000.00
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MARCH TOTAL

\$ 5,000.00

TOTAL FOR THE PERIOD

MARCH 28, 1946

TO

MAY 22, 1946.

\$28,511.67



RECEIPTS AND DISBURSEMENTS OF THE PARTNERSHIP  
AND JAMES A. AND AMELIA E. NOELL, INDIVIDUALLY.

OCTOBER 20, 1945 TO MAY 22, 1946.

RECEIPTS

PAYMENTS BY CUSTOMERS	
CASH SALES	\$138,062.54
LOAN - BANK OF AMERICA	477.09
CASH DEPOSIT	7,000.00
	50.80
SALE OF DEMONSTRATION HOUSES	3,843.75
SALE OF MATERIALS - BUSCEMI	649.38
SALE OF CAR OF LUMBER - BUSCEMI	2,050.00
AMELIA E. NOELL BANK BALANCE	86.95
RENT FROM 4195 YORK BOULEVARD	220.00
PROCEEDS SALE OF REAL ESTATE	16,636.58
UNIDENTIFIED CHECKS, BANK OF AMERICA, MO, PASA.	96.05
MONTGOMERY WARD REFUND CHECK	5,667.60
TRANSFER FUNDS OTHER BANKS	7,264.34

TOTAL RECEIPTS

\$182,105.08

AMOUNTS

TOTALS

DISBURSEMENTS AND BANK BALANCES

REFUNDS TO CUSTOMERS	\$ 36,297.47
OFFICE AND DISPLAY BUILDINGS	393.22
PURCHASES AND DEPOSITS ON LUMBER	47,097.48
LUMBER YARD - LAND AND IMPROVEMENTS	21,487.78
TOOLS AND EQUIPMENT	3,645.69
PARTNERSHIP EXPENSES: TRUCKING, PAYROLL, COMMISSIONS, ETC.	14,610.54
TRANSFER FUNDS OTHER BANKS	11,467.60
MISCELLANEOUS WITHDRAWALS BY PARTNERS	3,251.04
PAYMENTS IN CONNECTION WITH REAL ESTATE	2,841.36
PAYMENTS ON 1941 CHEVROLET AUTOMOBILE	523.80
PAYMENTS ON DEMONSTRATION HOUSES	731.45
ATTACHMENT JAMES A. NOELL	35,779.95
BALANCE IN BANKS MAY 22, 1946	622.03

TOTAL DISBURSEMENTS

AND

BANK BALANCES

\$150,093.41

CASH RECEIVED BY JAMES A. OR AMELIA E. NOELL

\$ 32,011.67



No. 11990

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United States  
Court of Appeals

for the Ninth Circuit

---

ESTELLA LATTA, JONES M. GRIFFIN and  
ALWIN CHAMBERS,

Appellants,

vs.

WESTERN INVESTMENT COMPANY,  
a Corporation, et al.,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division

FILED  
SEP 25 1948

PAUL P. O'BRIEN,









No. 11990

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United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Northern Division of the United States District Court for the Northern District of California.

ESTELLA LATTA, JONES M. GRIFFIN and  
ALWIN CHAMBERS,

Plaintiffs,

vs.

WESTERN INVESTMENT COMPANY, a corporation, SACRAMENTO INVESTMENT COMPANY, a corporation; VERA PENIX, WALTER FONG, CLAUDE A. and VERA G. BEAGLE, FRED BARDONI, JOSEPH and MATILDA DEVINCENZI, ROGER L. and MARIE BONDI, VERNE and VERA M. LEWIS, JENNIE T. STOLL, FRED FONG, GRACE LEE, CONFUCIUS CHURCH OF SACRAMENTO, GERTRUDE KAHN, JEAN LILLARD, FONG TEUNG, QUONG FONG, MAYNGO VINCENTE, ARMADE ZAMBRA, IRA JONES, JOHN V. NOONAN, BRUSILLA N. PEIP, and LOUIS H. MARKS, CHARLES S. HOWARD COMPANY, INC., THE SOUTHERN PACIFIC RAILROAD COMPANY, a corporation, THE CENTRAL PACIFIC RAILROAD COMPANY, a corporation, FIRST DOE, SECOND DOE, THIRD DOE, BLACK & WHITE, a corporation, BLUE AND GOLD, a corporation, and THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Defendants.

## COMPLAINT

### For Declaratory and Other Relief

Plaintiffs complain of defendants and for cause of action allege:

1.

That the plaintiffs, Estella Latta, Jones M. Griffin and Alwin Chambers appear herein as plaintiffs for themselves and for all other heirs of Mark Hopkins, similarly situated whose names are set forth in exhibit "F" and annexed hereto and made a part hereof. That the other heirs of Mark Hopkins [1\*] are so numerous, it is impracticable to bring them all before the Court, that the questions involved are of a common interest to all the heirs of Mark Hopkins, deceased.

2.

That plaintiffs, Estella Latta, Jones M. Griffin and Alwin Chambers are residents of the State of North Carolina; that all of the persons whose names are set forth in exhibit "F" are residents of States other than the State of California.

3.

That the names First Doe, Second Doe, Third Doe, and Black and White, and Blue & Gold Corporations are fictitious and are used to designate defendants whose true names are not known to plaintiffs, and that when such names are learned plaintiffs will ask leave to amend accordingly.

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\*Page numbering appearing at foot of page of original certified Transcript of Record.



4.

That Charles S. Howard and Company is a corporation duly organized and incorporated under and by virtue of the laws of the State of California and doing business in the County of Sacramento, State of California.

5.

That the Western Investment Company is a corporation organized and existing under the laws of the State of California, and domesticated and doing business in the State of California.

6.

That the Sacramento Investment Company is a Corporation duly organized and incorporated under and by virtue of the laws of the State of California and doing business in the County of Sacramento, California.

7.

That the Southern Pacific Railroad Company is a Corporation doing business in the State [2] of California with its principal office located in the City of San Francisco.

8.

That the Central Pacific Railroad Company is a Corporation operating and doing business in the State of California with its principal office located in the City of San Francisco.

9.

That Sacramento Investment Company, a Corporation; Vera Penix, Walter Fong, Claude A. and Vera G. Beagle, Fred Bardoni, Joseph and Matilda Devincenzi, Roger L. and Marie Bondi.

Verne and Vera M. Lewis, Jennie T. Stoll, Fred Fong, Grace Lee, Confucius Church of Sacramento, Gertrude Kahn, Jean Lillard, Fong Teung, Quong Fong, Mayngo Vincente, Armade Zambra, Ira Jones, John V. Noonan, Drusilla N. Peig, and Louis H. Marks, all are residents of the County of Sacramento, State of California.

10.

That this is a suit of a civil nature in equity for declaratory relief determining the validity of the purported decree of distribution in the matter of the estate of Mark Hopkins, deceased and determining the rights of the plaintiffs in the property both real and personal herein described, and hereafter discovered belonging to the Estate of Mark Hopkins, deceased; that an actual controversy exists relating to the legal rights and duties of the respective parties, under said purported decree of distribution; that the matters in controversy exceed exclusive of interest and costs, the sum or value in excess of Three Thousand (\$3,000.00) dollars; that the issues involved in this action are between the parties plaintiffs and the parties defendants, and between citizens of different states.

11.

That Mark Hopkins died intestate on or about the 29th day of March 1878, and was at the time of his death, and for some time prior thereto, a resident of the County of San Francisco, State of California, [3] that said decedent left neither father nor mother nor issue surviving him.

## 12.

That said decedent left property both real and personal in the State of California and in other States, the exact amount or value of which is unknown to your plaintiffs.

## 13.

That subsequent to the death of said Mark Hopkins, one Mary Frances Sherwood, under the name of Mary Frances Sherwood-Hopkins filed in the Probate Court of San Francisco her application for Letters of Administration of the estate of Mark Hopkins, deceased; that said application came on for hearing on or about the third day of June, 1878. purported Letters of Administration were issued to said petitioner thereupon.

## 14.

That the said Mark Hopkins died leaving the following heirs at law: Moses Hopkins, James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell, and Rebecca Hopkins Griffin, who were the brothers and sisters of the deceased.

That the Superior Court of the City and County of San Francisco was without jurisdiction to issue said Letters of Administration, in that the hearing on said application for Letters of Administration was had without notice having been given to the legal heirs of said decedent as required by the law governing, and more particularly as follows:

That at the time of the filing by said Mary Frances Sherwood-Hopkins of her application for Letters of Administration, said applicant well knew

the names and addresses of the true and lawful heirs of said decedent; that said applicant willfully, knowingly, and with intent to defraud said lawful heirs, and to deceive the Honorable Superior Court, of the City and County of San Francisco concealed from the said Court and from the Clerk thereof the [4] names and addresses of the said brothers and sisters of said Mark Hopkins, except only Moses Hopkins, that by reason of said fraud of said applicant upon the court and said heirs, the Clerk of said court failed to mail to said heirs except to Moses Hopkins notice of said hearing or notice of the time and place of said hearing, and that the said heirs others than Moses Hopkins, received no notice thereof either directly or indirectly and said heirs never knew of said hearing. That the purported decree of Distribution, hereinafter referred to and a copy thereof attached and made a part hereof marked Exhibit "A", affirmatively shows on its face that no notice was given the Plaintiffs or their Ancestor, the heirs of Mark Hopkins.

## 16.

That under and pursuant to said purported Letters of Administration to her issued by said Court, said Mary Frances Sherwood-Hopkins administered the estate of said decedent until her removal as administratrix on or about the 26th day of August, 1881, that immediately thereafter Moses Hopkins filed application for letters of Administration in said Court, and was granted purported letters of Administration, and thereafter acted as administrator of said estate.

## 17.

That at the time of the filing of his said application for Letters, said Moses Hopkins well knew the names and addresses of his four brothers and three sisters, above named, but knowingly and willfully, and with the intent to defraud and deceive, concealed from the Court and from the Clerk thereof the names and addresses of said legal heirs; that by reason of said fraud of said applicant upon the said Court and Clerk and said heirs, the Clerk of said Court failed to mail to said heirs notice of said hearing or the time and place of said hearing, and that the said heirs received no notice thereof either directly or indirectly and never knew of said hearing. That the decree of distribution herein above referred to affirmatively shows on its face that Moses Hopkins failed to comply with the law existing at the time of filing said application for the appointment as administrator; and that he failed to furnish the court with the names and addresses of the heirs; [5] his brothers and sisters, and that no notice was given to them as required by law.

## 18.

That under and pursuant to said purported Letters of Administration, said Moses Hopkins administered said estate, and some time prior to the first day of November, 1883, applied to said Court for a decree of settlement of account and distribution of said estate, that Plaintiffs and other legal heirs of the estate of Mark Hopkins or their ancestor did not receive, and none of them did receive, any notice, legal or otherwise, of said petition for



settlement of account and final distribution, or of the time and place of hearing thereof, as is shown on the face of the decree, and never knew of said hearing of said account and petition for distribution and never knew that said purported decree of distribution had been ordered or made or entered.

## 19.

Plaintiffs allege that the purported decree of distribution rendered on the 1st day of November, 1883, five years after the death of the deceased is void for the following reason, to-wit:

“A”. That in the first paragraph of the purported decree the statement is made, “that the administrator rendered a full account and report of his administration.” This statement is untrue as will appear more particularly in sub-paragraph F and G of this Complaint.

“B”. That in the Second Paragraph of said decree the statement is made, “That the clerk has given notice of settlement.” The said decree affirmatively shows on its face that no notice was given to all the heirs as required by law existing at that time. The law at that time, 1878, required the administrator at the time of making application for letters of administration to furnish the Clerk of the Court, the names and addresses of all the heirs. Then it was the duty of the clerk to mail notice to each of said heirs or legatees. That this was not done is shown on the face of said decree.

“C”. In the third Paragraph of said decree the Court, in legal effect, finds Mary Frances Sherwood-Hopkins [6] to be the only person interested in the

said estate except the administrator. This finding which is untrue, must be taken to be based upon the false statements and mis-representation of said administrator. Moses Hopkins, said Administrator, well knew the names of his brothers and sisters, the legal heirs of Mark Hopkins, deceased, and their Post Office Addresses and said statements and mis-representations was a fraud upon the court and upon said heirs, conceived and perpetuated by Moses Hopkins and Mary Frances Sherwood-Hopkins who were acting in a fiduciary capacity at that time for the purpose of depriving said heirs of their rightful inheritance.

“D”. That in the fourth paragraph of said decree, it appears that the residue of money in the hands of the administrator at the time of filing his account was the sum of Eight Hundred Ninety-five Thousand and Seventy-eight Dollars and one cent (\$899,078.01) and that after the rendition of said account he had received the additional sum of Eight Hundred Sixteen (816.00) and in paragraph VIII of the decree in the purported distribution of said funds, only Eight Hundred Ninety-five Thousand, Seventy-eight Dollars and one cent (\$895,078.01) was distributed by the Court, leaving the sum of Eight Hundred Sixteen Dollars (\$816.00) in the hands of the administrator undistributed and unaccounted for in said decree of distribution.

“E”. That in the seventh paragraph of said decree, the Court made the following order: “That ( $\frac{3}{4}$ ) fourth of said estate be distributed to the widow, Mary Frances Sherwood-Hopkins, and ( $\frac{1}{4}$ )

One Fourth of said estate be distributed to the brother of said deceased, Moses Hopkins." Plaintiffs, as hereinafter set forth, allege that said Mary Frances Sherwood-Hopkins was not the wife of the decedent nor an heir, or entitled to said estate or any part thereof. Under the laws existing in 1878 the widow of a decedent who died intestate was entitled to ( $\frac{1}{2}$ ) One-half only of the decedent's estate Plaintiffs allege that upon the face of the decree it appears that the court exceeded its jurisdiction in the purported distribution of ( $\frac{3}{4}$ ) Three-fourths of said estate to the alleged widow of the decedent.

"F". In the Eighth Paragraph of said decree the Court attempted to distribute the personal [7] property but failed to apportion the securities to the purported distributees respectively.

The said personal property set out in the decree and attempted to be distributed is as follows: "The following is a particular description of the said residue of said Estate referred to in this decree and of which distribution is now ordered as aforesaid. \$895,078.01 in gold coin of the United States, cash in the hands of said Administrator, 586 $\frac{1}{4}$  shares of the capital stock of the Copperopolis Railroad Company, 350 shares of the Capital Stock of the Los Angeles and San Diego Railroad Company, 750 shares of the Capital Stock of the Potrero and Bay View Railroad Company, 10,000 shares of the Capital Stock of the Occidental and Oriental Steamship Company, 750 shares of the Capital Stock of the California Pacific Company, 102 shares of the Capi-

tal Stock of the Rocky Mountain Coal and Iron Company, 1388  $\frac{8}{9}$  shares of the Eastern Development Company,  $\frac{1}{4}$  of 393 Bonds of the Sacramento Valley Railroad Company, 1 share of the Capital Stock of the Orleans Hill Vinticultural Association." That the said Copperopolis Railroad Company, The Los Angeles and San Diego Railroad Company, The Potrero and Bay View Railroad Company, The California Pacific Company, and The Sacramento Valley Railroad Co. above described and the stocks therein above described were non existent at the time of the death of Mark Hopkins; that said Railroad companies, many years prior to the death of the said Mark Hopkins, had been consolidated with and absorbed by the Southern Pacific Railroad Company, and Stocks of the Southern Pacific Railroad Company of the value of \$24,940,597.29, issued to Mark Hopkins, issued in lieu thereof, and Southern Pacific stock so issued to Mark Hopkins, and appraised in the inventory and appraisement filed by said appraisers appointed by the court as to the value of \$24,940,597.29 was known to said administrator but was not distributed or accounted for in said purported decree of distribution.

"G". That prior to and before November 1, 1883, and at the time of filing of the said final report by the said administrator and the signing of the purported decree, the administrator, Moses Hopkins, knew of and was in possession of, as these plaintiffs are informed believe and upon such information and belief allege, of the following assets



[8] discovered to date hereof consisting of cash on hand, stocks, and bonds and other personal property unreported and undistributed by the said decree, to-wit:

Cash on hand.....	816.00
Southern Pacific Railroad Interest...\$	4,917,366.00
Central Pacific Railroad Interest....	1,455,000.00
Santa Fe O. and A. Railroad.....	100,000.00
Berkeley Railroad .....	22,000.00
Amador Railroad .....	112,000.00
Central Pacific (Convertible).....	5,500.00
Sacramento and Placerville Railroad.	87,500.00
United States 4 per cent Bond.....	129,378.00

The following shows personal property belonging to the estate.

Central Pacific Railroad.....	5,140,600.00
Southern Pacific Railroad.....	1,996,250.00
Sacramento and Placerville.....	40,950.00
Amador Railroad .....	22,470.00
Berkeley Railroad .....	5,550.00
Market Street Railroad.....	136,960.00
Mission Bay Bridge Company.....	20,930.00
Colorado Steamship Navigation.....	6,666.00
Lone Coal and Iron Company.....	16,000.00
Oakland Water Front Company.....	182,350.00
Capital Gas Company of Sacramento.	35,812.00
Lonner Lumber and Brown Company	1,620.00
Omaha Gold Mining Company.....	2,100.00
Richelieu Mining Company.....	534.00
Capital Savings Bank of Sacramento	79,180.00



Home Mutual Life Insurance Company .....	250.00
Riverside Road Company of Sacramento .....	100.00
Stocks, Bonds and etc. owned Jointly by the estate with Stanford, Hunt- ington & Crocker.....	1,450,956.04
Live Stock and Wagons, etc.....	9,781.00
Household Furniture .....	247,945.34
Real Estate .....	909,109.88
Bills Receivable .....	558,690.90
Open Accounts .....	2,719,728.90
Cash and Bills Receivable Owned jointly by the estate with E. J. Miller, Jr. and others.....	7,433.36
Debts due the estate in the amount of From the London and San Francisco Bank .....	2,092,294.48
From the Central Pacific Railroad Company .....	21,885.70
Capital Savings Bank at Sacramento.	200,498.22
The Undivided One Quarter Interest on a note of David D. Colton dated October 5, 1874.....	341,070.50
Note Daniel Click.....	1,000,000.00
Note of Central Pacific Railroad Com- pany to Huntington Hopkins Com- pany .....	52,959.00
Note of E. W. Hopkins.....	227,899.23
	11,000.00

Note from Leland Stanford in favor of Hunting and Hopkins which is outlawed .....	32,462.82
Stock in the Ione Coal and Iron Com- pany .....	400,000.00
	<hr/>
	\$24,940,592.29

That the said Moses Hopkins, as such administrator, fraudulently failed and neglected to account for any of said personal property last above described of the appraisal value of \$24,940,597.29, and said personal property of the value of \$24,940,597.29, was not distributed or accounted for in said purported decree of distribution.

“H”. That in the ninth Paragraph of the said decree the Court recognized an agreement between Mary Frances Sherwood-Hopkins, Moses and Samuel Hopkins, in which they agreed that the Court might distribute the real estate to Mary Frances Sherwood-Hopkins, and in the 10th paragraph the court refers to a deed executed by Moses and Samuel Hopkins to Mary Frances Sherwood-Hopkins. a copy of said deed is hereto attached and made a part of this complaint for the purpose of attack, and designated as exhibit “B”.

That in the Eleventh paragraph of the said decree, the Court attempted to distribute the real estate to the said Mary Frances Sherwood-Hopkins, pursuant to the terms of said deed and attempted to ratify the deed herein referred to. Plaintiffs allege that the attempted transfer of the title to

said real estate was and is void. That the deed herein referred to from Moses and Samuel Hopkins to Mary Frances Sherwood-Hopkins which is a part of the judgment [10] Roll on which the decree is based is void and of no effect for lack of description of said real property which is apparent on the face of the deed, that the court could not ratify a void Instrument; that the decree fails to describe the property attempted to be transferred or to refer to any instrument that does describe said property.

“T”. That in the sixth paragraph of said purported decree the court said, “that the account of the said administrator be and the same is hereby settled, allowed and approved, and the residue of said estate hereinafter particularly described and any other property not now known or discovered, which may belong to said estate or in which said estate may have any interest, be and the same is hereby distributed as follows: Three fourths, ( $\frac{3}{4}$ ), to Mary Frances Sherwood-Hopkins and one fourth, ( $\frac{1}{4}$ ) to Moses Hopkins.”

That at said date all of the personal property of said estate herein before described as well as the real estate hereinafter described was known to and in the possession of the administrator, Moses Hopkins.

That there was no agreement between the parties, mentioned in the decree as to the distribution of the personal property, and under the law governing the said Mary Frances Sherwood-Hopkins, if she was the wife of Mark Hopkins was only entitled to One half, ( $\frac{1}{2}$ ) of said estate and the court ex-

ceeded its jurisdiction in distributing Three fourths. ( $\frac{3}{4}$ ) thereof to her.

“J”. That said decree is indefinite as to the heirship and purported distribution attempted to have been made by said decree.

“K”. That said decree was rendered November 1, 1883, more than five years after the death of the deceased and the plaintiffs are informed, believe and so allege on information and belief that the court immediately after the death of Mark Hopkins appointed A. J. Bryant, R. B. Ridding, and E. J. Miller, Jr. appraisers of the estate of the deceased, Mark Hopkins, and that on or about May 5, 1878, a full and complete inventory of the property was filed in the court setting out all the personal property of the estate and placing a valuation on same; and that [11] the administrator, knew of the property of which the estate consisted; and that there was no unknown property at the filing date of said final account and the date of the signing of said decree of distribution.

“L”. That the decree fails to establish the heirship, while it states that Mary Frances Sherwood-Hopkins and the administrator, Moses Hopkins, are the only interested parties. It does not determine what interest they were entitled to under the law or that they were the only heirs; or in what manner they were interested; said holdings by the court, based upon false and fraudulent concealment and suppression by the said Mary Frances Sherwood-Hopkins and Moses Hopkins, of the names and addresses of the heirs of Mark Hopkins, was a

fraud upon the court and the heirs interested in said estate.

That as to the property heretofore and hereinafter set out that was not included in the account or inventory filed with the court on which the said decree was based, there has been no distribution made of same and said property is now a part of the estate of Mark Hopkins, deceased.

“M”. That the said administratrix, Mary Frances Sherwood-Hopkins, and the said administrator, Moses Hopkins conceived and formed the purpose of deceiving the court before which the said estate was being probated, and in pursuance of said fraudulent intent and scheme withheld from said court at the time of the settlement of said account and purported distribution of the said estate, the fact that the said deceased had left property other than that reported, which property so reported was a minor portion of said estate, and the said administrator, Moses Hopkins, in returning his account of said estate and also in his petition for distribution therein, falsely and fraudulently represented to said Court that the said deceased had no interest in or to any other property except that reported, and that he purposely and falsely and fraudulently with intent to deceive said court and to defraud the heirs of the deceased of their portion of said estate, failed to set forth or disclose in the final account and petition for distribution therein, the existence of millions of dollars worth of personal property of said deceased herein above set forth, and failed to report to said court a vast amount of real estate and



the proceeds of the sale of that part thereof that had been sold and transferred [12] by said administrator and administratrix without any order of the Superior Court as herein set forth. That Moses and Mary Frances Sherwood-Hopkins, prior to the signing of said decree as herein alleged in plaintiffs' second and third causes of action failed to set out and describe other real estate owned by the deceased personally and in which he had an interest, and the fact that the same was a portion of his estate. That the said court in the course of the probate of said estate, was deceived and misled by the said administrator, Moses Hopkins's fraudulent acts and practice and attempted to distribute the entire estate of the deceased to the administrator, Moses Hopkins and the former administratrix Mary Frances Sherwood-Hopkins, to the exclusion of all the aforesaid heirs of said deceased, whom the said administrator, Moses Hopkins, knew, and was under the legal duty to protect.

That at and during the whole period of probate of said estate the brothers and sisters, the heirs of the deceased other than Moses Hopkins, were not residents of the State of California, and were absent therefrom, and that none of them had any notice or knowledge and never knew of the aforesaid false and fraudulent acts of said administrator, Moses Hopkins, particularly of the filing of the false and fraudulent account and petition for distribution or of the contents thereof, or of the hearing thereon, and that in consequence thereof, said heirs were not present or represented at said hear-

ing nor in making or filing of said decree of distribution. That the said administrator, Moses Hopkins, and the said Mary Frances Sherwood-Hopkins, conspiring together, sought to appropriate to themselves by said purported Decree of Distribution, the entire Estate of Mark Hopkins, deceased. In contravention of the rights and interest of the legal heirs.

That the said Moses Hopkins, administrator, occupied another and more vital relation to the heirs, being a brother, and as acting as their representative, as administrator, assumed a legal duty and was bound to the utmost good faith and it became his duty, not only during and through the course of the probate of said estate, to make full disclosure to the court and to those heirs, his brothers and sisters, as to the nature, extent and character of said estate, and fully inform them of their rights in the premises to the end that their rights be fully protected.

## 20.

That by reason of the facts as herein alleged, the brothers and sisters of said Mark Hopkins whose descendants, are the plaintiffs, were deprived of their property rights, and their vested interest in the estate of said deceased, Mark Hopkins, without due Process of Law in contravention of the laws of the State of California and the Constitution of said State and in violation of the Constitution of the United States and the Amendments thereto.

## 21.

The Plaintiffs further allege that neither the said Mary Frances Sherwood-Hopkins nor the said

Moses Hopkins, at any time prior to or during the probate proceedings therein, notified said legal heirs, or any of them of the death of their brother, Mark Hopkins, or of the administration of the estate or of the distribution thereof, but kept said facts a closed secret until the early eighties, after the death of some of the brothers and a sister, and that when one of the heirs learned of the death of their relative, Mark Hopkins, and wrote for information relative to the estate he received a reply from Moses Hopkins, stating that his brother, Mark Hopkins, had died leaving a wife and nine children.

## 22.

That in the early eighties one Zebedee Russell, a relative of Mark Hopkins, had information that Mark Hopkins had died, and on receiving such information said relative wrote to Moses Hopkins requesting information as to the death of Mark Hopkins and as to his estate: that said Zebedee Russell received a reply from said Moses Hopkins that his brother, Mark Hopkins had died and had willed all of his estate to him, the said Moses Hopkins.

That said information coming from Moses Hopkins who occupied a fiduciary relation with said heirs was by them believed; that said heirs had no occasion even to suspect that the statements contained in said letters were not true as to the wife and nine children, and had died leaving a will, believed and relied on said statements and were lulled to sleep and abandoned the idea of making further investigation of said estate until years later when they [14] discovered said statements were false and

made for the purpose of deceiving the heirs at law, and the heirs were thereby deceived. That in 1945 upon the discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes, fraud, and misrepresentation by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to said estate.

### 23.

That by reason of the fact that the ancestors of the Plaintiff lived more than three thousand miles from the scene of action and owing to the mode of travel and mail facilities back in the pioneer days of California in 1878 and immediately following, said Moses Hopkins and Mary Frances Sherwood-Hopkins were afforded ample opportunity to prosecute their deceptive and fraudulent scheme without the knowledge of said heirs.

### 24.

Plaintiffs further allege that on April 5, 1879, prior to his appointment as administrator, the said Moses Hopkins, together with Mary Frances Sherwood-Hopkins and one Samuel F. Hopkins, executed a deed in Sacramento, California, to Collis P. Huntington, Charles Miller, Albert Gallatin, and W. R. S. Foye to and for a number of lots and parcels of land located in Sacramento and San Francisco, California, hereinafter described in Plaintiffs' Third Cause of action and by reference made a part hereof; stating in the body of said deed that they were the wife and brother of Mark Hopkins and constituted the only heirs of the deceased; that



said statements were false and fraudulent; that said Samuel Hopkins was not an heir or the son of an heir of Mark Hopkins.

## 25.

That on March 13, 1880, the said Moses and Samuel Hopkins executed a deed to Mary Frances Sherwood-Hopkins purporting to convey to her a one-eighth interest each of all their right, title, and interest in and to all the real estate owned by Mark Hopkins, deceased. Said deed is hereto attached marked Exhibit "B" and made a part hereof. That said deed was executed prior to the appointment of [15] Moses Hopkins as administrator of said estate. That at the time of the execution of said deed, said Mary Frances Sherwood-Hopkins was acting as administratrix of said estate under the purported Letters of Administration theretofore issued by said Court; that by virtue of said Letters of Administration said Mary Frances Sherwood-Hopkins occupied a fiduciary relation and a position of trust as between herself and the legal heirs of Mark Hopkins, deceased. That Samuel Hopkins, one of the purported grantors name in said deed, had no interest in said estate and was not an heir of Mark Hopkins.

## 26.

That Plaintiffs are informed believe and allege on information and belief that the said Mary Frances Sherwood-Hopkins was never married to the late Mark Hopkins and was not his wife; but as the Plaintiffs are informed, believe and allege on information and belief, was the housekeeper in the home of Mark Hopkins and knew of the relationship of



Mark Hopkins and his kindred in North Carolina. That in order to perpetrate the scheme to defraud the legal heirs of Mark Hopkins, to-wit, brothers and sisters in North Carolina, Moses Hopkins entered into the scheme and an agreement with the said Mary Frances Sherwood-Hopkins to the effect that if she would aid and abet him in his unlawful scheme he would give her three-fourths of said estate. That Mary Frances Sherwood-Hopkins did aid and abet Moses Hopkins in said fraudulent scheme and entered into the said unlawful agreement upon which the decree of distribution of the Court was based, as aforesaid, by suppressing and concealing from the Court the facts relative to the heirship and rights of the heirs of Mark Hopkins, that by reason of the said acts of Moses Hopkins and Mary Frances Sherwood-Hopkins, a fraud was practiced upon the Court and upon the Plaintiffs and their ancestors. These facts were not discovered by the Plaintiffs or their predecessors heirs of Mark Hopkins, or by any of them until September, 1945.

## 27.

That at the time the said Moses Hopkins applied for Letters of Administration and during his tenure as administrator, and at the time he made [16] application for distribution and when the Court signed the decree, purporting to make distribution of the property and assets of said estate, and at the time of the execution of the deed to Collis P. Huntington, et al., stating that Mary Frances Sherwood-Hopkins was the wife of Mark Hopkins and

that they were the only heirs of Mark Hopkins, as herein before stated, Moses Hopkins knew of his own knowledge of the four brothers, and three sisters and knew that they lived in Randolph County, North Carolina and purposely concealed and suppressed said facts with the intention and purpose of deceiving the Court and defrauding the legal heirs of their rights and interest in said estate, and did deceive the Court and defraud said heirs of their interest in said estate as aforesaid.

## 28.

That the said fraudulent acts of Mary Frances Sherwood-Hopkins in fraudulently representing herself to be the wife of the said Mark Hopkins were not discovered by the Plaintiff or their predecessors or by any of them until 1945 when Plaintiffs discovered that she was only the housekeeper in the home of the said Mark Hopkins.

## 29.

The Plaintiffs and their Ancestors and each of them have used due diligence in seeking to have determined and to enforce their rights as heirs to said estate. That the files and records of the probate proceedings deeds and other documents and all information pertaining to the estate and the probate thereof were destroyed by fire in 1906, long before the Plaintiff or their ancestors had any knowledge of the facts regarding said estate. There were no records in the Court where the probate proceedings were had wherein the plaintiffs or their ancestors could secure the information necessary to prosecute their action for relief.

That by chance in August in 1945, the Plaintiffs after long research discovered the deed, above referred to recorded in the County of Sacramento from Mary Frances Sherwood, Samuel and Moses Hopkins, to Huntington et al., that threw some light on the estate, and in 1945, a deed was discovered in Stockton, San Joaquin County, with other facts pertaining to said estate, and in 1945 the Plaintiffs [17] discovered in Kern County other information pertaining to said estate, and a purported copy of the inventory filed in said estate was discovered by plaintiffs in the Hall of History in 1947.

30.

That the fraudulent acts and schemes of Moses Hopkins and Mary Frances Sherwood-Hopkins, as heretofore alleged, were by them conceived, perpetrated, and executed with the intent and purpose to deceive, and were calculated to deceive and did deceive the Honorable Court and did defraud and deprive the legal heirs of Mark Hopkins, of their interest in and to said estate.

31.

That at the time of the rendition of the said purported decree of distribution, all claims and debts against said decedent, all taxes on said estate, and all debts, expenses and charges of administration had been fully paid and discharged.

32.

That on the 20th day of October, 1931, by petition previously filed in the Superior Court of Randolph County, State of North Carolina, and after a hearing in open court and a verdict of a jury, a

decree was entered establishing the legal heirship and next of kin of the estate of Mark Hopkins, deceased, that said decree, a copy of which marked Exhibit "E" is annexed hereto and made a part hereof, sets forth the names of those proven to be entitled to participate in the estate of said Mark Hopkins, deceased.

## 33.

That the plaintiffs are informed and believe and upon such information and belief allege the facts to be that each and every person whose name appears in said Exhibit "F" is a legal descendant of the brothers and sisters of Mark Hopkins; that said brothers and sisters are now dead and that the persons named in said Exhibit "F" are the next of kin and collateral heirs of the aforesaid Mark Hopkins, deceased. And are entitled to their distributive share of said estate. [18]

## 34.

That Alvin Chambers, one of the Plaintiffs herein, is a direct descendant of Joseph Hopkins, who was an elder brother of Mark and Moses Hopkins; that Jones Griffin, one of the Plaintiffs herein, is a direct descendant of Rebecca Hopkins Griffin, who was a sister of Mark and Moses Hopkins.

That Estelle Cothran Latta, is a direct descendant of James Hopkins, a brother of said Mark Hopkins.

## 35.

That the said administrator Moses Hopkins, died in the City and County of San Francisco, State of California, in the year of 1892, and since said date

the office of administrator of the estate of Mark Hopkins, deceased has been vacant.

That thereafter on the 27th day of January 1947, the heirs having discovered property unadministered, a petition for letters of administration de bonis-non upon the estate of Mark Hopkins deceased was duly filed in the Superior Court of the State of California, in and for the City of San Francisco, the court having jurisdiction of said estate, by J. T. Blount, a person duly qualified to act as such administrator, and after notice duly given as provided by law, said petition was heard by the Hon. Timothy I. Fitzpatrick, Judge of said Superior Court; and said petition for said appointment was denied on the 19th day of March 1947, and said office of administrator of said estate is now vacant, and there is no personal representative of said estate to bring this action.

Wherefor Plaintiffs pray judgment. [19]

For a second cause of action plaintiffs complain of the defendants and allege:

Plaintiffs refer to paragraph 1, to paragraph 35 inclusive of their first cause of action and by such references makes the same a part of this their second cause of action as if set forth in full herein.

### 36.

That on the 27th day of January, 1877, Solomon Heydenfeldt, Simon Hart, and David Goodman, conveyed to one David D. Colton, a certain tract of land situated in the Counties of Amador, San Joaquin, and Sacramento, of which said land the following is a description: The tract of land known as



and called the Rancho Arroyo Seco Rancho and containing Eleven leagues of land, more or less, and bounded and described as shown in and by the patent of the United States to Joseph Mora Moss, Horace W. Carpenter, Edward B. Beale and Herman Wohler dated the twenty-ninth day of August A. D. 1863 and recorded in the County Recorders Office of the County of Amador in Book 1 of Deeds on pages 403 and following and in the County Recorders Office of the County of Sacramento in Book No. two (2) of Patents on Page 324 and following as appears in a certain deed, a copy of which, marked Exhibit "D" is annexed hereto and made a part hereof.

Said deed, referred to above as Exhibit "D" contains the following, statement, to-wit: "And Whereas, the said David D. Colton did thereafter, viz; January 26th, 1877 execute to Leland Stanford, Charles Crocker, C. P. Huntington and Mark Hopkins (the said Stanford, Crocker, and Huntington being of the parties of the second part hereto, and the said Mark Hopkins, have since died) a certain instrument in writing of which the following is a copy viz: "This is to certify that in concluding the purchase of the Arroyo Seco Ranch of Solomon Heydenfeldt, Simon Hart, and David Goodman, I have sold four fifths ( $\frac{4}{5}$ ) of the same in equal proportions as follows:

To Leland Stanford one-fifth	( $\frac{1}{5}$ )
To Charles Crocker one-fifth	( $\frac{1}{5}$ )
To Mark Hopkins one-fifth	( $\frac{1}{5}$ )
To C. P. Huntington one-fifth	( $\frac{1}{5}$ ) [20]

Holding—one-fifth ( $1/5$ ) myself, that the property being deeded to me individually I hold the same in trust for the joint account of the parties above named, with myself in equal proportion to be transferred as we may determine best.”

That said deed was recorded July 26, 1880, in Book “S” of Deeds at pages 438, etc., in the office of the County Recorder of Amador County.

That certified copies of said deed were recorded in San Joaquin and Sacramento Counties, respectively. A copy of which is hereto attached marked Exhibit “D” and reference made thereto.

37.

That Mark Hopkins, referred to in said deed marked Exhibit “D”, died intestate on or about the 29th day of March, 1878. That at the time of his death said Mark Hopkins was the owner of said undivided One-fifth ( $1/5$ ) interest in and to the said Eleven Square leagues of land described in said deed, marked Exhibit “D”, and upon his death said interest vested in the heirs of Mark Hopkins, to-wit: Moses, James, John, Martin, Joseph, brothers of said decedent; and Annie and Prudence Russell, and Rebecca Griffin, sisters of said decedent.

38.

That on the 16th day of January 1880, a certain deed conveying the same property was executed from Ellen Colton et al. to the Ione Coal and Iron Co., conveying eleven (11) Leagues of land which deed was recorded in Book S. Page 438 in Amador County and recorded in Book V Page 591, Sacra-

mento County. Reference is made to said deed for the descriptions thereof.

That the Ione Coal and Iron Company on September 1, 1917, executed a deed to the McKissick Cattle Company for 37,231.38 more or less acres of said property being a part of the Arroyo Seco Ranch, said deed being recorded in Sacramento County in Book 473, Page 132. Reference is made to said deed for a particular description thereof.

## 40.

That the Ione Coal and Iron Co., on October 11, 1919, executed a deed covering said property to the McKissick Cattle Company for eleven leagues of land known as and being a part of the Arroyo Seco Ranch, said deed being recorded in Book 515 page 292, Sacramento County and thereafter the said McKissick Cattle Co., conveyed said property to Stephen E. Kieffer and said Kieffer conveyed the same to Western Investment Co.

## 41.

That on March 16, 1942, the Western Investment Company, executed a deed to Charles S. Howard Co., for 37,231.56 acres more or less of said property said deed is recorded in Sacramento County in Book 944 at Page 199, being a part of the Arroyo Seco Ranch conveyed by deed from Joseph Moro Moss et al. to David H. Colton, reference is made to said deed for particular description. That thereafter David Colton died and his widow Ellen Colton succeeded to his estate, that said Ellen Colton deeded said real property to the Ione Coal and Iron Company, which in turn subsequently

deeded said property to the McKissick Cattle Company, as heretofore set forth.

42.

That on September 7, 1929, The Western Investment Company executed a deed to the Western Properties Co. for 8330 acres of said land, said deed being recorded in the County of **Sacramento in book 594** at page 412, the same being a part of the Arroyo Seco Ranch deed to David Colton. That David Colton died and his widow Ellen Colton succeeded to his estate, that said Ellen Colton deeded said real property to the Ione Coal and Iron Company, which in turn and subsequently deeded said property to the McKissick Cattle Company as heretofore alleged. Reference is made to said deed for a particular description thereof. That the said Western Properties Co., on the 17th day of February, 1932, amended its charter and changed the name of said Corporation to the Amador Properties Co., a corporation, and on December 27, 1932, said Amador Properties Co. was dissolved. That thereafter, J. W. Mason, H. G. Tallerday, L. N. Slater, W. G. Aldenhagen, and F. S. Howard, as trustees of said Amador Properties Co., executed a deed to the Western Investment Company, a California Corporation, transferring the said 8330 acres of land formerly held by said Western Properties Co., as heretofore alleged; and defendant Western Investment Company is now in possession of and claims to be the owner of said 8330 acres described in said deed; that the claim of said defendant Western Investment Company to one-fifth ( $1/5$ ) thereof,

is without right, or title. That said deed to Western Investment Company is recorded in Book 673 of Deeds, at page 9, in the office of the County Recorder of Sacramento County, reference to which deed is hereby made for a particular description of the property. That said Western Investment Company holds said property as tenants in common with plaintiffs.

## 43.

That Mary F. Sherwood-Hopkins, Moses Hopkins and Samuel F. Hopkins joined in the deed to the Ione Coal and Iron Company of the said Eleven [22] Square Leagues of Land, as set forth in Exhibit "D". And Plaintiffs allege, that the property described in said deed is not mentioned nor referred to in the decree of distribution in the estate of Mark Hopkins deceased; that the interest of Moses Hopkins and that of Mary F. Sherwood-Hopkins, if any, she had, was not established in said decree of distribution; that Samuel Hopkins was not an heir of Mark Hopkins deceased and had no interest in said real property; that the purported transfer of said Real Property by Moses, Mary and Samuel Hopkins is neither recognized, referred to or ratified by said decree of distribution or by any order confirming said sale at all, and is null and void; that the Ione Coal & Iron Company did not by said deed acquire title to the  $\frac{1}{5}$  interest of Mark Hopkins in said real property; that said property was well known by the Administrator of the estate of Mark Hopkins at the time of filing the petition for distribution; that by the recitals in said deed the



Ione Coal and Iron Company and its successor, Western Investment Co., and Charles S. Howard Co., and the Western Investment Company, defendants herein, and each of them was put on notice as to the interest of the estate of Mark Hopkins in said land, the issue of the heirs of said decedent, the provisions and defects in the decree of distribution, all as more particularly set forth in Plaintiff's first cause of action.

## 44.

And Plaintiffs allege that defendant, Western Investment Company is in possession of and claims to be the owner of Eight Thousand Three Hundred & Thirty (8,330) acres described in said deed: that the claim of said defendant to one-fifth ( $1/5$ ) thereof is without right.

## 45.

That the said Charles S. Howard Co., is in possession of and claims to be the owner of the track containing 37,231 acres more or less described in said deed from the Western Investment Company, that the claim of said defendant to  $1/5$  thereof is without right. That said property is a part of the Arroyo Seco Ranch being the same land deeded to David Colton, then to the Ione Coal and Iron Company and from said Company to the McKissick [23] Cattle Co., as heretofore alleged reference is made to said deeds for a full and particular description.

## 46.

That the heirs of Mark Hopkins as herein alleged are the lineal descendants, and are the owners of

One-fifth ( $1/5$ ) intrest in and to said real estate and are tenants in common with said defendants, that plaintiffs are the lineal descendants of the heirs of Mark Hopkins as set forth in their first cause of action herein; have been and now are out of possession of said real property.

47.

That neither the plaintiffs herein nor any of the heirs of Mark Hopkins except that of Moses Hopkins had either actual or constructive notice that the possession of said co-tenant is hostile to said heirs until 1945, when they by chance discovered the deed in San Joaquin County, hereto attached, marked Exhibit "D", and by reference made a part hereof.

Wherefor plaintiffs pray judgment. [24]

For a third and separate cause of action plaintiffs complain of defendants and allege:

Plaintiffs refer to paragraph 1, to 35 inclusive of their first cause of action and by such reference makes the same a part of this their third cause of action as if set forth in full herein.

48.

That on the 29th day of March, 1878, the time of his death, and for sometime prior thereto, the said Mark Hopkins owned a  $1/2$  interest and was in possession of certain pieces and parcels of land situate in the County of Sacramento, State of California, and more particularly described as follows, to-wit:

The North  $1/2$  of lot No. 8 in block bounded by U. & V., fourth and fifth streets.

Now in possession of William and Vera Penix.

The west  $\frac{1}{2}$  of the East half of lot No. 3, in block bounded by K. and L., Second and Third Streets, and

The East  $\frac{1}{4}$  of lot No. 3 in block bounded by K. and L. Second and Third Streets, and

The North half of the west half lot number 4, in block bounded by K. and L., Second and Third Streets. Now in the possession of Walter Fong.

The East half of the west  $\frac{3}{4}$  of lot number 6, in block bounded by K. and L., Second and Third Streets, and

The West thirty feet of lot number six in block bounded by K. and L., Second and Third Streets, and

The East half of the West half and the West half of the East half of lot number seven in block bounded by K. and L., Second and Third Streets, now in the possession of Claude A. and Vera G. Beagle.

That part of the west half of the East half of lot number four in block bounded by K. and L., Second and Third Streets now in the possession of Fred Bardoni. [25]

That upon the death of Mark Hopkins—the brothers and sisters of said decedent—succeeded to said real property as tenants in common.

#### 49.

That soon after the death of said Mark Hopkins and while his estate was still in probate, Mary Frances Sherwood-Hopkins, the then appointed and acting administratrix of said estate, executed individually, together with Moses Hopkins and Samuel

Hopkins a deed to said real estate to Collis P. Huntington, et al., which said deed appears of record in volume 97 of deeds at page 91 in the office of the County Recorder of Sacramento County, State of California, a copy of said deed marked Exhibit "C" is attached hereto and made a part hereof. That by said deed, the said Mary Frances Sherwood-Hopkins, administratrix and said Moses and Samuel Hopkins, purported to grant, release and convey to Collis P. Huntington et al., all the right, title and interest, that the said Mark Hopkins, deceased, had at the time of his death, and all that his or the parties of the first part have since acquired by operation of law or otherwise in and to the real and personal property of said deceased and assets of the firm of Huntington Hopkins Company, that said deed was made without an order of the Court, and the attempted transfer has never been confirmed by the Court, or the assets therefrom accounted for in the purported decree.

## 50.

That by means of said deed said Mary Frances Sherwood-Hopkins, said administratrix, and the other grantors therein named, purported to transfer said real and personal property belonging to said estate of Mark Hopkins deceased and to the heirs of the said decedent the brothers and sisters of the said Mark Hopkins, to-wit: Moses, James, John, Martin, and Joseph Hopkins, Annie and Prudence Russell and Rebecca Griffin. That said deed was and is null and void except as to the  $\frac{1}{8}$  interest in said property therein described owned by

Moses Hopkins. That plaintiffs herein are the owners as tenants in common of  $\frac{7}{8}$  of the one-half interest owned by the said Mark Hopkins in the real and personal property of the partnership of Huntington [26] & Hopkins as shown and described in the deed hereto attached marked Exhibit "C".

51.

That said Mark Hopkins at the time of his death was the sole owner and in possession of certain lots and parcels of land situated in the County of Sacramento, State of California, and more particularly described as follows, to-wit: The North half of the West half of Lot No. 4 K & L 5 & 6 Streets, and the West 19 feet and seven inches of Lot 4, now in the possession of Joseph & Matilla De Vincenzi and Roger L. and Marie Bondi. Lot Number (4) K & L 4 & 6 Streets, and the West half of Lot No. 4, is now in the possession of Verne and Vera Lewis.

The East half of Lot No. 4, is now in the possession of Jennie T. Stoll. The West half of Lot Three M & N 5 & 6 Streets, is now in the possession of Fred Fond and Grace Lee. The East half of Lot No. 3, is now in the possession of Confucius Church of Sacramento.

Lot No. 4 M & N 5 & 6 Streets, is now in the possession of the following named defendants: The N-W half Gertrude Kahn. The North half of East half in Jean Lillard. The North 27 feet of South half, in Fong Tueng Quong. The North 27 feet of the South 53 feet, in Fong May Ngo. The South 26 feet, in Vincent Ameda Lambra.



Lot No. 2 M & N 4 & 5 Streets, and the West one half of Lot No. 3 M & N 4 & 5 Streets, is now in the possession of Ira Jones.

The South 75 feet of Lot 5 L & M 5 and 6 Streets, is now in the possession of the Sacramento Investment Co.

The West 32 feet of Lot No. 2 M & N 19th & 20th Streets, and the North half of East half of Lot No. 1 M & N 19th & 20th Streets is now in the possession of John V. Noonan.

The North one fourth of Lot No. 5 M & N 5 & 6 Streets is now in the possession of Drusilla N. Peig.

The West half of Lot No. 2 K & L 4 & 5 Streets is now in the possession of Louis H. Mark. [27]

52.

That upon the death of said Mark Hopkins said brothers and sisters of said decedent succeeded to said real property as tenants in common thereof.

That plaintiffs herein are the owners as tenants in common of a seven-eighths, ( $\frac{7}{8}$ ) interest in and to said real property above described. That in the probate proceedings had upon the estate of said Mark Hopkins deceased, said Mary Frances Sherwood-Hopkins and Moses Hopkins suppressed and concealed said property, and in the purported decree of distribution of said estate, no reference is made to nor is there any record of said real or per-

sonal property herein referred to nor to said deed herein above set forth, although the existence of said property was at all times herein mentioned, well known to said Moses Hopkins and Mary Sherwood-Hopkins.

That defendants as heretofore designated as being in the possession of said property own one-eighth, ( $\frac{1}{8}$ ), interest in said property and hold a seven-eighths, ( $\frac{7}{8}$ ), interest therein as tenants in common with Plaintiffs.

That defendants as heretofore set out and each of them claims to own the whole thereof, that the Claim of said defendants and each of them to  $\frac{7}{8}$  thereof is without right.

Wherefor, Plaintiffs pray judgment. [28]

For a fourth and separate cause of action plaintiffs complain of defendants and allege:

Plaintiffs refer to and adopt paragraphs 1, to 35 inclusive of their first cause of action and by such reference make the same a part of this their fourth cause of action as though set forth herein in full.

53.

That defendant Southern Pacific Railroad Company is a Corporation duly created and existing under and by virtue of the laws of the State of Kentucky; that said Corporation has its principal place of business in the City of San Francisco, State of California and has complied with the laws of the State of California relating and pertaining to a foreign Corporation doing business in the State of California.

54.

That said defendant Railroad Corporation is now and was operating and doing business in the State of California in the year 1878.

55.

That Mark Hopkins, said decedent, was one of the incorporators of said defendant Railroad Corporation; that plaintiffs are informed and believe and upon such information and belief allege the facts to be that said Mark Hopkins at the time of his death owned one fourth ( $\frac{1}{4}$ ), of the capital stock of said Corporation together with certain bonds, the exact number and amount of which are unknown to Plaintiffs.

56.

That upon the death of said Mark Hopkins the following brothers and sisters of said decedent, to-wit: Moses, James, John, Martin, Joseph Hopkins, Annie, and Prudence, Russell, and Rebecca Griffin succeeded to said stocks and bonds, subject to administration of the estate of Mark Hopkins, deceased. [29]

57.

That by reason of the premises the plaintiffs herein, direct descendants of above named brothers and sisters of Mark Hopkins, except Moses Hopkins, are the owners of and entitled to the possession of a seven-eighths. ( $\frac{7}{8}$ ), interest in and to said stocks and bonds.

58.

That neither the plaintiffs nor any of their said ancestors have received either by transfer or decree

of Court or otherwise any of said stocks and bonds.

59.

And plaintiffs allege that defendant's Corporation holds the said seven-eighths, (7/8), interest of plaintiffs in said stocks and bonds in trust for plaintiffs, as tenants in common.

Plaintiffs further allege that if said defendant Corporation has transferred upon its books any of said stocks and bonds or assigned the interest of plaintiffs in and to said stocks and bonds or liquidated said stocks and bonds such transfer, assignment or liquidation of said stocks, bonds, or other interests of plaintiffs was without authority of said heirs, or any Court of Law and in violation of the legal rights of said plaintiffs.

60.

That prior to and at the time of the death of Mark Hopkins, said defendant Southern Pacific Railway Company was the owner of many branch lines of Railroad known as Southern Pacific Railroad Company, Corporation, San Francisco San Jose Railroad Company, Santa Clara and Pajaro Valley Railroad Company, The California Southern Railroad, The Southern Pacific Branch Railroad Company, The Los Angeles and San Pedro Railroad Company, The San Pablo and Tulare Railroad Company, the Stockton and Visalia Railroad Company, The Stockton Copperopolis Railroad Company, The Los Angeles and San Diego Railroad Company, The Los Angeles and Independence Railroad Company, The Northern Railway Company, The Vaca Valley and Clear

Lake Railroad Company, The Sacramento [30] Valley Railroad Company, The Folsom and Placerville Railroad Company, The Sacramento and Placerville Railroad Company, The Amador Branch Railroad Company, The Berkeley Branch Railroad Company, The San Francisco Marysville Railroad Company, The Sacramento and San Francisco Railroad Company, The California Pacific Railroad Company, and the California Pacific Railroad Extension Company, which said branch roads were consolidated with Southern Pacific Railroad Company. That said Mark Hopkins, deceased, was at the time of his death the owner of stocks and bonds of said Railroad Companies merged with defendant Southern Pacific Company the amount of which is unknown to plaintiff.

61.

That the stocks and bonds in said Railroad Companies owned by Mark Hopkins as herein above set forth, except such as are designated in Paragraph 19 Sub. Sec. F of the first cause of action, were not designated in nor included in the decree of distribution of the estate of Mark Hopkins hereinbefore referred to, to-wit in Paragraph 19 of the first Cause of Action of Plaintiffs Complaint.

Wherefore, Plaintiffs pray judgment. [31]  
For a fifth and separate cause of action plaintiffs complain of defendants and allege:

62.

Plaintiffs refer to paragraphs 1, to 35 inclusive of their first cause of action and by such reference



make the same a part of this their fifth cause of action as though set forth in full herein.

## 63.

That defendant Central Pacific Railroad Company, at all times herein mentioned was and now is operating and maintaining railroads in the State of California under and by virtue of the laws of said State and Plaintiffs are informed and believe and upon such information and belief allege that said Central Pacific Railroad Company has been and is now merged with defendant, Southern Pacific Railroad Company.

## 64.

That Mark Hopkins, deceased, was one of the incorporators of said defendant Central Pacific Railroad Company and at the time of his death, Plaintiffs are informed and believe and allege on information and belief owned one-fourth, ( $\frac{1}{4}$ ) of the capital stock of said Central Pacific Railroad Company together with bonds of said corporation, the exact amount of which is now unknown to plaintiffs.

## 65.

That upon the death of said Mark Hopkins the following brothers and sisters, to-wit: Moses, James, John, Martin, and Joseph Hopkins, Annie and Prudence Russell and Rebecca Griffin succeeded to said stocks and bonds as tenants in common.

## 66.

That by reason of the premises the plaintiffs herein, direct descendants of above named brothers and sisters of Mark Hopkins, except Moses Hop-

kins, are the owners of and entitled to the possession of a seven-eighths, ( $7/8$ ), interest in and to said  $1/4$  of said stocks and bonds. [32]

67.

That neither the plaintiffs nor any of their said ancestors have received either by transfer or decree of Court or otherwise any of said stocks and bonds.

68.

Plaintiffs allege that said defendant, Central Pacific Railroad Company and Southern Pacific Railroad Company, Corporation holds the seven-eighths, ( $7/8$ ) interest of plaintiffs in said stocks and bonds in trust for plaintiffs.

69.

Plaintiffs further allege that if said defendant Corporation has transferred upon its books any of said stocks and bonds, or entered thereon any assignment of the interest of plaintiffs in and to said stocks and bonds, or liquidated any stocks and bonds, such transfer, assignment, or liquidation of said stocks, bonds, or other interests of plaintiffs, was without authority of said heirs or of a Court of Law and in violation of the legal rights of said plaintiffs and their ancestors.

70.

That prior to the death of Mark Hopkins, said defendant Railway Company was the owner of several branch lines of railroad known as: The California and Oregon Railroad Company, The San Francisco Oakland and Alameda Railroad Company, the San Joaquin Valley Railroad Company, which said branch roads were consolidated with the Central Pacific Railroads Company. That said

Mark Hopkins, deceased, was at the time of his death the owner of stocks and bonds of said railroad companies merged with defendant Central Pacific Railroad Company.

71.

That the stocks and bonds in said Railroad Companies owned by Mark Hopkins as herein above set forth, except such as are designated in paragraph 19, Sub. Section "F" of the first cause of action of this Complaint, were not designated in nor included in the purported decree of distribution of the estate of Mark Hopkins herein before referred to, to-wit [33] in paragraph 19 of the first cause of Action of Plaintiffs Complaint.

Wherefore plaintiffs pray for a declaratory judgment of this court, declaring and adjudging as follows:

A. That the plaintiffs herein and the persons similarly situated whose names are set forth in exhibit "F" annexed to this complaint and made a part hereof, are the heirs of Mark Hopkins deceased.

B. That the purported decree of distribution in the estate of Mark Hopkins, deceased, herein set out in full, made on the first day of November 1883, was obtained by extrinsic fraud practiced upon the Court and the heirs of Mark Hopkins, deceased, and for the reasons set forth in paragraph 19 of plaintiffs First Cause of Action, and that said decree of distribution is null and void.

C. That the property described in plaintiffs' complaint and not mentioned or described in said purported decree of distribution was at all times

during said administration of said estate of Mark Hopkins, and at the time of the rendition of said decree of distribution known to said administrator, and that the title to said property so known to said administrator Moses Hopkins and not described in said purported final account and decree of distribution did not pass to the distributees named in said purported decree of distribution, but remained a part of the estate of Mark Hopkins undistributed.

D. If this court should find that the said decree of distribution was and is valid and in full force and effect, then that this Court find and declare that the title to the property herein described, known to said administrator at the time of the making of said decree of distribution, but not set forth, mentioned or described therein, did not pass to the distributees named Moses Hopkins and Mary Frances Sherwood-Hopkins, or to either of them, by reason of that part of said decree purporting to distribute to said Moses Hopkins and Mary Frances Sherwood-Hopkins, "all property not now known or hereafter discovered."

E. That the Court declare and decree that the title to the property known to said administrator Moses Hopkins at the time of the entering of said [34] decree of distribution was vested  $\frac{7}{8}$  or such interest as the record may disclose in the plaintiffs the heirs of Mark Hopkins, deceased, subject to administration.

F. That the court direct the Superior Court of the State of California in and for the City and County of San Francisco, sitting in probate, to ap-

point an administrator, de bonis non, and to distribute the said property herein described and any other property hereinafter discovered, pursuant to the findings and judgment of this Court, to the persons determined by this Court to be the heirs of Mark Hopkins deceased.

G. For such other relief as the Court may deem meet and equitable in the premises.

H. And for the cost.

/s/ BUSICK & BUSICK,  
/s/ CHARLES H. SECOMBE,  
/s/ S. J. BENNETT,  
/s/ WALTER H. SILER,  
/s/ CARLYLE HIGGINS,

Attorneys for the Plaintiffs.

State of North Carolina,  
County of Durham—ss.

Estelle Latta, being first duly sworn deposes and says: That she is one of the plaintiffs in the above entitled action: That she has read the foregoing Bill of Complaint and knows the contents thereof: and that the same is true except only as to the matters therein stated upon information and belief and that as to those matters she believes it to be true.

ESTELLE LATTA.

Subscribed and sworn to before me this 26th day of March, 1947.

(Seal)

JAS. R. STONE,

Asst. Clerk of the Superior Court of Durham  
County, State of North Carolina. [35]

[Endorsed]: Filed July 27, 1945, H. A. van der Zee, Clerk. J. V. F. Farley, Deputy Clerk.



EXHIBIT "A"

In the Superior Court of the City and County of  
San Francisco, State of California  
Department No. 9

In the Matter of the Estate of Mark Hopkins,  
Deceased.

DECREE OF DISTRIBUTION

Moses Hopkins Administrator of the Estate of Mark Hopkins, deceased having on the sixteenth day of March A. D. 1883, rendered and filed herein a full account and report of his administration of said estate, which account was for a final settlement, and having with said account filed a petition for the final distribution of said Estate.

And said account and petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court that the Clerk had given notice of the settlement of said account and the hearing of said petition in the manner and for the time heretofore ordered and directed by this Court.

And Mrs. Mary Frances Sherwood-Hopkins the only person interested in said Estate except said Administrator, having filed her consent in writing that said account may be settled and allowed.

And it appearing by the testimony of said Administrator and the vouchers by him submitted that said account is in all respects true and correct and that it is supported by proper vouchers; that the residue of money in the hands of the Administrator

at the time of filing said account was Eight Hundred and Ninety-five Thousand and Seventy-eight dollars and one cent, (\$895,078.01) that since the rendition of said account there has been received by the said Administrator the sum of Eight Hundred and Sixteen dollars (\$816); that the sum of Seventy-two Hundred and Eighty-six dollars has been extended by him as necessary expenses of administration, the [37] vouchers whereof, together with a statement of such receipts and disbursements are now presented and filed and said statement is now settled and allowed and the payments are approved by this Court, and it appearing that all claims and debts against said decedent, all taxes on said Estate and all debts, expenses and charges of administration have been fully paid and discharged and that said estate is ready for distribution and in condition to be closed.

And it appearing to the Court that the said parties in interest, to-wit, Mary Frances Sherwood Hopkins and said Moses Hopkins have agreed in writing that the commissions and fees of administration of said estate shall be fixed at the sum of Three Hundred Thousand Dollars; and that the same shall be apportioned as follows: to Mary Frances Sherwood Hopkins formerly Administratrix of said estate the sum of Two Hundred and Twenty-five Thousand dollars, (\$225,000) and to Moses Hopkins the sum of Seventy-five Thousand dollars (\$75,000) and that the said Moses Hopkins Administrator as aforesaid pay the said Mary Frances Sherwood Hopkins said sum of Two Hundred and Twenty-five Thousand dollars (\$225,000) as her

commissions as administratrix of said Estate and to himself the said sum of Seventy-five Thousand Thousand dollars (\$75,000) as his commissions out of the moneys in his hands whereof distribution is hereby ordered.

It is further ordered adjudged and decreed that the said final accounts of the said Administrator be and the same are settled, allowed and approved and that the residue of said Estate hereinafter particularly described and any other property not now known or discovered which may belong to said Estate or in which said Estate may have any interest, be and the same is hereby distributed as follows:

Three fourths of said Estate to be distributed to the widow of said deceased, Mary Frances Sherwood Hopkins, and one fourth of said Estate to be distributed to the brother of said deceased, Moses Hopkins.

The following is a particular description of the said residue of said Estate referred to in this decree and of which distribution is now ordered as aforesaid. \$895,078.01 in gold coin of the United States, cash in the hands of said Administrator, 586 $\frac{1}{4}$  shares [38] of the capital stock of the Copperopolis Railroad Company, 350 shares of the Capital Stock of the Los Angeles and San Diego Railroad Company, 750 shares of the capital stock of the Potrero and Bay View Railroad Company, 10,000 shares of the Capital Stock of the Occidental and Oriental Steamship Company, 750 shares of the Capital Stock of the California Pacific Railroad Company,

102 shares of the Capital Stock of the Rocky Mountain Coal and Iron Company, 1388  $\frac{8}{9}$  shares of The Western Development Company,  $\frac{1}{4}$  of 393 Bonds of the Sacramento Valley Railroad Company, 1 share of the Capital Stock of the Orleans Hill Vinticultural Association.

And it further appearing to this Court that the parties interested in said Estate on the Fourth day of September, A. D. 1879, to-wit Mary Francis Sherwood Hopkins, Moses Hopkins, and Samuel F. Hopkins, whose interest in said Estate has since been acquired by Moses Hopkins, did on said day enter into an agreement, in writing wherein it was agreed among other things that upon the final settlement of said Estate the Court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said Estate to said Mary Frances Sherwood Hopkins.

And it further appearing to this Court, that the said Moses Hopkins and the said Samuel F. Hopkins, did on the thirteenth day of March, A. D. 1880, by deed duly made, executed and delivered convey to Mary Frances Sherwood Hopkins all their right title and interest in and to all the real estate of which the said Mark Hopkins died seized and possessed, situated lying and being within the State of California. It is further ordered adjudged and decreed that the entire amount of said real estate of which the said Mark Hopkins died seized and possessed, and in which the said estate has any right title or interest, be and the same is hereby set aside

and distributed to Mary Francis Sherwood Hopkins, widow of said deceased and the said conveyance from Moses Hopkins and Samuel F. Hopkins to Mary Francis Sherwood Hopkins is hereby approved and confirmed. Done in open Court this the first day of November, A. D. 1883. etc.

J. V. COFFEY,

Judge. [39]

The annexed instrument is a correct copy of the original on file in my office.

Attest: Certified July 9, 1946.

H. A. VAN DER ZEE,

County Clerk of San Francisco, and Ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco.

By LUTHER DOBSON,

Deputy. [40]

### PLAINTIFFS' EXHIBIT "B"

This indenture, made the Thirteenth day of March in the year of our Lord One Thousand Eight Hundred and Eighty between Samuel F. Hopkins and Moses Hopkins heirs at law of Mark Hopkins deceased parties of the first part and Mary Frances Hopkins of the City and County of San Francisco State of California the party of the second part Witnesseth: that the said parties of the first part for and in consideration of the sum of One Dollar lawful money of the United States of



America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged do by these presents grant bargain sell convey unto the said party of the second part and to her heirs and assigns forever all of their right title and interest to and in all real estate of which the said Mark Hopkins died seized and possessed situated lying and being within the State of California, the interest of each of said parties of the first part in said real estate being one undivided eighth part which they hereby severally convey to the said party of the second part together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part her heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written Signed Sealed and Delivered.

SAM'L F. HOPKINS (Seal)

in the Presence of

MOSES HOPKINS (Seal)

The foregoing instrument was properly acknowledged and recorded in the County of San Mateo, State of California in book 32, dates on back 525.

State of California

County of San Mateo—ss.

I, T. C. Rice, County Recorder in and for the [41] County of San Mateo, State of California, do hereby certify the annexed to be a full, true and correct copy of the record of Deed Samuel F. Hopkins et al to Mary Frances Sherwood Hopkins as the same appears of record in Vol. 23 of deeds at page 525, records of said County.

In Witness Whereof, I have hereunto set my hand and seal of office this 27th day of July A. D. 1944.

G. C. RICE,

County Recorder.

By RUTH KIRSTE,

Deputy Recorder. [42]

EXHIBIT "C"

Mary Frances Sherwood Hopkins et als to Collis  
P. Huntington et als

This indenture made this fifth day of April A. D. 1879 between Mary Frances Sherwood Hopkins of the City and County of San Francisco, State of California.

Samuel F. Hopkins of St. Clair, Michigan and Moses Hopkins of Sutter County, California being respectively the widow and brother of Mark Hopkins deceased and constituting the only heirs of said deceased parties of the first part and Collis P. Huntington of the City and State of New York, Charles Miller of the City and County of San Fran-

cisco, State of California, Albert Gallatin and W. R. S. Foye of the City of Sacramento, County of Sacramento, State of California composing the present firm of Huntington, Hopkins & Co., parties of the second part.

Whereas the late firm of Huntington, Hopkins & Co. composed of the parties of the second part and the said late Mark Hopkins was dissolved by the death of said Mark Hopkins leaving the parties of the second part the surviving partners thereof.

And, Whereas by Articles of Co-partnership dated March 30th, 1878, a new firm has been organized under the same name but composed of the parties of the second part.

And, Whereas for proper consideration it had been agreed that all the interest of said Mark Hopkins deceased in the business property and assets of said late firm of Huntington, Hopkins & Co. should be transferred to and vested in the parties of the second part as composing the present firm of Huntington Hopkins & Co.

Now, This Indenture Witnesseth that the parties of the first part in consideration of the premises and of the sum of One Dollar to them in hand by the parties of the second part the receipt of which is hereby acknowledged have granted released and conveyed and by these presents do grant release and convey to the parties of the second part [43] their heirs and assigns in the shares and proportions in which they are respectively interested in and owners of the business property and assets of said present firm of Huntington Hopkins & Co. as specified in

their said Articles of Co-partnership dated March 30th 1878 all the Estate right title and interest that the said Mark Hopkins deceased had at the time of his death and all that his Estate or the parties of the first part as his heirs at law have since acquired by operation of law or otherwise of in or to the following described Real Estate to-wit: All that certain Real Estate situate in the City and County of San Francisco State of California and described as follows to-wit: Commencing at a point in the Northerly line of Bush Street distant thereon One Hundred and two feet six inches ( $102\frac{6}{12}$ ) Easterly from the corner formed by the intersection of said line of Bush with the Easterly line of Battery Street running thence Easterly along said line of Bush Street forty five (45) feet thence at right angles Northerly Ninety-one feet eight inches ( $91\frac{8}{12}$ ); thence at right angles Westerly Forty five (45) feet and thence at right angles Southerly Ninety-one feet eight inches ( $91\frac{8}{12}$ ) to the commencement being portion of Beach and Water Lots Numbers Two Hundred and Sixty-five (265) Two Hundred Sixty-six (266) Two Hundred Seventy-five (275) and Two Hundred Seventy-six (276); Also all that Real Estate situate in said City and County of San Francisco described as follows to-wit: Commencing at a point in the Northeasterly line of First Street distant thereon One Hundred and Thirty-seven feet six inches ( $137\frac{6}{12}$ ) Southeasterly from the point of intersection thereof with the Southeasterly line of Market Street thence running Southeasterly along said line of First Street



Ninety-one feet eight inches ( $91 \frac{8}{12}$ ) thence at right angles Northeasterly One Hundred and Thirty-seven feet and six inches ( $137 \frac{6}{12}$ ) thence at right angles Northwesterly Ninety-one feet eight inches ( $91 \frac{8}{12}$ ) and thence at right angles Southwesterly One Hundred and Thirty-seven feet six inches ( $137 \frac{6}{12}$ ) to the point of commencement being Beach and Water Lots number Two Hundred and Ninety six (296) and Two Hundred and Ninety seven (297) as numbered and delineated on the original Beach and Water Lot survey of said City of San Francisco also all that certain Real Estate situate in the City of Sacramento County of Sacramento State of California described as follows to wit: [44] The North one half ( $\frac{1}{2}$ ) of Lot Eight (8) in the block bounded by "M & L" Fourth and Fifth Streets also the West one half ( $\frac{1}{2}$ ) of the East one half ( $\frac{1}{2}$ ) of Lot Three (3) in the block bounded by "K & L" Second and Third Streets also the East one quarter ( $\frac{1}{4}$ ) of Lot Three (3) in block bounded by "K & L" Second and Third Streets also East one half ( $\frac{1}{2}$ ) of the West three quarters ( $\frac{3}{4}$ ) of Lot Six (6) in block bounded by "K & L" and Second and Third Streets: Also the West Thirty (30) of Lot Number Six (6) in block bounded by "K & L" Second and Third Streets; Also the East one half ( $\frac{1}{2}$ ) of the West one half ( $\frac{1}{2}$ ) and the West one half ( $\frac{1}{2}$ ) of the East one half ( $\frac{1}{2}$ ) of Lot Number Seven (7) in the block bounded by "K & L" Second and Third Streets; also the North one half ( $\frac{1}{2}$ ) of the West one-half ( $\frac{1}{2}$ ) of Lot



Number Four (4) in the block bounded by "K & L" Second and Third Streets; also that part of the West one half ( $1\frac{1}{2}$ ) of the East ( $1\frac{1}{2}$ ) of Lot Four (4) in the block bounded by "K & L" and Second and Third Streets described as follows: Beginning Thirty-nine (39) feet and eight (8) inches from the Northeast corner of said Lot Number Four (4) thence running West along the North line of said Lot Four (4) inches, thence North Eighty (80) feet to the place of beginning as shown and designated upon the official map or plan of said City of Sacramento; also all of the rest residue and remainder yet to come and unexpired of the Leasehold interest and term created by the lease executed by Lorenzo Silgreaves to the said Collis P. Huntington and others composing the said late firm of Huntington Hopkins & Co. (which lease bears date December 3rd 1877 and is recorded in the office of the County Recorder of the said City and County of San Francisco Liber 67 of Leases at page 154) of in and to that parcel of land situate in the said City of San Francisco and described as follows, to-wit: Commencing at a point in Northerly line of Bush Street distant One Hundred and Forty-seven feet and six inches ( $147\frac{6}{12}$ ) from the Easterly line of Battery Street running thence Northerly parallel to Battery Street Ninety-one feet and eight inches ( $91\frac{8}{12}$ ) thence at right angles Easterly Forty-seven feet and six inches ( $47\frac{6}{12}$ ), thence at right angles Southerly to the Northwesterly line of Market Street, thence Southwesterly along said Northwesterly line of Market Street Seven feet and

six inches (7 6/12) to the Northerly line of Bush Street, and [45]

To Have and to Hold unto the said party of the third part, its successors and assigns forever.

In Witness Whereof the parties of the second part have hereunto set their hands and seals in evidence of their request to the party of the first part to execute this instrument, and for the purpose of uniting with her in the execution thereof, and the party of the first part in accordance with said request has hereunto set her hand and seal, the day and year first herein above written.

Signed Sealed and delivered by M. F. S. Hopkins and Samuel F. Hopkins in the presence of E. W. Hopkins.

Signed, sealed and delivered by Ellen M. Colton in presence of David Cook.

State of California,

City and County of San Francisco—ss.

Filed and recorded at the request of W. F. & Co.'s Agent July 26th 1880 at 10 min. past 8 o'clock, in Book "S" of Deeds, pages 438, etc., Records of Amador County.

L. J. FOUTENROSE.

County Recorder.

Recorded at the request of Wells Fargo & Co., August 5th, 1880 at 58 min. past 9 o'clock A. M.

## EXHIBIT "D"

This Indenture made and entered into at the City and County of San Francisco, State of California this Sixteen (16th) day of January A. D. 1880 between Ellen M. Colton, party of the first part, Leland Stanford, Charles Crocker, C. P. Huntington, Mary F. S. Hopkins, Moses Hopkins and Samuel F. Hopkins, parties of the second part, and "Ione Coal and Iron Company," a corporation organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business at the City and County of San Francisco, party of the third part, Witnesseth:

Whereas, heretofore, viz: at the City and County of San Francisco on the 23rd day of January A. D. 1877 David D. Colton purchased from Solomon Haydenfeldt, Simon Hart, and David Goodman and received from them a conveyance of a certain tract of land, of which the following is a description, viz:

The tract of land known as and called the Rancho Arroyo Seco and containing Eleven leagues of land, more or less, and bounded and described as shown in and by the patent of the United States to Joseph Mora Moss, Horace W. Carpentier, Edward F. Beale and Herman Wohler dated the twenty ninth day of August A. D. 1863 and recorded in the County Records Office of the County of Amador in Book I of Deeds on pages 403 and following and in the County Records Office of the County of Sacramento in Book Number Two (2) of Patents on pages 324 and following, said land being situated

in the Counties of Amador, San Joaquin, and Sacramento, in the State of California,

And Whereas, the said David D. Colton did thereafter, viz: January 26th 1877 execute to Leland Stanford, Charles Crocker, C. P. Huntington and Mark Hopkins (the said Stanford, Crocker and Huntington being of the parties of the second part hereto, and the said Mark Hopkins, having since died) a certain instrument in writing of which the following is a copy viz:

“This is to certify that in concluding the purchase of the Arroyo Seco Ranch of Solomon Heydenfeldt, Simon Hart, and David Goodman, I have sold [47] four fifths ( $\frac{4}{5}$ ) of the same in equal proportions as follows:

To Leland Stanford one-fifth ( $\frac{1}{5}$ )

To Charles Crocker one-fifth ( $\frac{1}{5}$ )

To Mark Hopkins one-fifth ( $\frac{1}{5}$ )

To C. P. Huntington one-fifth ( $\frac{1}{5}$ )

Holding—one fifth ( $\frac{1}{5}$ ) myself. That the property being deeded to me individually I hold the same in trust for the joint account of the parties above named, with myself in equal proportion to be transferred as we may determine best:

All the other papers and stock pertaining to the property I have given into the hands of the Western Development Company for safe keeping, except the map, which has been with Mr. Montague, from which he is to make a new one for our future use.

DAVID D. COLTON”

San Francisco—January 26th, 1877.

And Whereas, the said Mark Hopkins has since died and the aforesaid Mary F. S. Hopkins, Moses Hopkins and Samuel F. Hopkins are his heirs at law and have succeeded to all of his estate and rights: And whereas, the said David D. Colton has since died and left all of his estate by his last will and testament to the said Ellen M. Colton, the party of the first part hereto:

And Whereas, the said parties of the second part have requested the said party of the first part to unite with them in a conveyance of the said tract of land to the party of the third part hereto, and to convey the said tract of land, to the said party of the third part:

Now Therefore, this Indenture Witnesseth, that in consideration of the premises aforesaid, the said party of the first part and the said parties of the second part, have sold, conveyed and transferred and do by these presents sell, assign and transfer, unto the said party of the third part, its successors and assigns, all of their right, title and interest in and to the said tract of land, with its appurtenances and improvements of whatever nature. [48]

To Have and to Hold unto the said party of the third part, its successors and assigns forever.

In Witness Whereof the parties of the second part have hereunto set their hands and seals in evidence of their request to the party of the first part to execute this instrument, and for the purpose of uniting with her in the execution thereof, and the party of the first part in accordance with



said request has hereunto set her hand and seal, the day and year first herein above written.

Signed Sealed and delivered by M. F. S. Hopkins and Samuel F. Hopkins in the presence of E. W. Hopkins.

Signed, sealed and delivered by Ellen M. Colton in presence of David Cook.

(Seal) LELAND STANFORD

(Seal) CHAS. CROCKER

(Seal) C. F. HUNTINGTON

(Seal) By E. H. MILLER,

His atty in fact.

(Seal) M. F. S. HOPKINS

(Seal) MOSES HOPKINS

(Seal) SAML. F. HOPKINS

(Seal) ELLEN M. COLTON

State of California,

City and County of San Francisco—ss.

On the Sixteenth (16th) day of January in the year One Thousand Eight Hundred and Eighty (1880) before me Charles J. Torbert, a Notary Public in and for the said City and County of San Francisco, State of California, duly commissioned and qualified, personally appeared Leland Stanford and Charles Crocker known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal this 16th day of January A. D. 1880.

(Seal) CHARLES J. TORBERT,

Notary Public in and for the City and County of San Francisco, State of California. [49]

State of California

City and County of San Francisco—ss.

On this Sixteenth (16th) day of January in the year One Thousand Eight Hundred and Eighty (1880) before me Charles J. Torbert, a Notary Public in and for the said City and County of San Francisco, State of California, duly commissioned and qualified, personally appeared E. H. Miller, Jr., known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of C. P. Huntington and acknowledged to me that he subscribed the name of C. P. Huntington thereto as principal and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal this 16th day of January A. D. 1880.

(Seal)

CHARLES J. TORBERT,

Notary Public in and for the City and County of  
San Francisco, State of California.

State of California,

City and County of San Francisco—ss.

On this Sixteenth (16th) day of January in the year of our Lord One Thousand Eight Hundred and Eighty (1880) before me, Charles J. Torbert, a Notary Public in and for the said City and County of San Francisco, duly commissioned and qualified, personally appeared E. W. Hopkins, personally

known to me to be the same person whose name is subscribed to the within instrument, as a witness thereto, who, being by me duly sworn, deposed and said, that he resides in the City and County of San Francisco, State of California, that he was present and saw M. F. S. Hopkins (a widow) and Samuel F. Hopkins, personally known to him to be the same persons described in and who executed the said within instrument, as parties thereto, sign, seal and deliver the same; and that the said M. F. S. Hopkins and Samuel F. Hopkins acknowledged in the presence of said affiant that they executed the same, and that he, the said affiant thereupon subscribed his name thereto as a witness. [50]

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal this 16th day of January A. D. 1880.

(Seal) CHARLES J. TORBERT,  
Notary Public in and for the City and County of  
San Francisco, State of California.

State of California,  
City and County of San Francisco—ss.

On this Twenty-fourth (24th) day of January in the year One Thousand Eight Hundred and Eighty (1880), before me, Charles J. Torbert a Notary Public in and for the said City and County of San Francisco, State of California, duly commissioned and qualified personally appeared Moses Hopkins, known to me to be the person whose name is sub-

scribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal this 24th day of January A. D. 1880.

(Seal) CHARLES J. TORBERT,  
Notary Public in and for the City and County of  
San Francisco, State of California.

State of California,  
City and County of San Francisco—ss.

On this Twenty-third day of July A. D. One Thousand Eight Hundred and Eighty (1880) before me, Holland Smith, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Daniel Cook, personally known to me to be the same person whose name is subscribed to the annexed instrument as a witness thereto who being by me duly sworn, deposes and says, that he resides in the City and County of San Francisco, that he was present and saw Ellen M. Colton, known to him to be the same person, described in, whose name is subscribed to, and who executed the annexed instrument as party thereto, sign, seal and deliver the same; and that the said Ellen M. Colton acknowledged in the presence of deponent, that she executed the same freely and [51] voluntarily; and for the uses and purpose therein mentioned, and that he, the deponent, thereupon signed his name as a subscribing witness thereto.

In Witness Whereof, I have hereunto set my

hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year last above written.

(Seal)                      HOLLAND SMITH,  
Notary Public, 307 Montgomery Street.

Filed and recorded at the request of W. F. & Co.'s Agent July 26th 1880 at 10 min. past 8 o'clock A. M., in Book "S" of Deeds, pages 438 etc. Records of Amador County.

L. J. FOUTENROSE,  
County of Recorder.

Recorded at the request of Wells Fargo & Co., August 5th, 1880 at 58 min. past 9 o'clock A. M.

### EXHIBIT "E"

In the Superior Court  
North Carolina, Randolph County

SANDY YOUNG HOPKINS, LAURA HOPKINS KIRK, NORMAN LEE FREEMAN  
and BLANCHE FREEMAN, et al.,

vs.

W. L. HILL.

### JUDGMENT

This cause coming on to be heard at October Term, 1931, of the Superior Court of Randolph County before His Honor, N. A. Sinclair, Judge, and a jury, and the jury having answered the issues submitted to them as follows:

1. Were James Hopkins, John Hopkins, Joseph Hopkins, Martin Hopkins, Elizabeth Hopkins, Pru-



dence Hopkins, Annie Hopkins, Mark Hopkins, Moses Hopkins and Rebecca Hopkins the children, heirs-at-law and next of kin of Edward Hopkins and Hannah Crow Hopkins of Crow Creek, New Hope Township, Randolph County, North Carolina.

Answer: Yes.

2. If so, was Mark Hopkins, son of Edward and Hannah Crow Hopkins the same person who went to California and became Treasurer of the Central Pacific Railroad and an organizer of the Ione Coal and Iron Company?

Answer: Yes.

3. Are the plaintiffs in this action the heirs-at-law and next of kin of the said Edward Hopkins, Hannah Crow Hopkins, Mark and Moses Hopkins?

Answer: Yes.

4. Are the plaintiffs the owner of the land described in the complaint?

Answer: No.

It is Therefore considered and adjudged that the plaintiffs are the sole heirs-at-law of Edward Hopkins and Hannah Crow Hopkins, and of Mark Hopkins and Moses Hopkins, but that the plaintiffs are not the owners of the land described in the complaint, the same being to the defendant, W. L. Hill. It is further adjudged that the plaintiffs pay the cost of the action, to be taxed by the clerk.

H. A. SINCLAIR,  
Judge Presiding.

North Carolina

Randolph County

I, Maude Lee Boling, Ass't Clerk Superior Court of said County and State, do hereby certify the attached sheets to be and contain a true and correct copy of the complaint, Issues and Judgment in an action entitled Sandy Young Hopkins, Laura Hopkins Kirk, Norman Lee Freeman and Blanche Freeman, et als, vs. W. L. Hill, the same being taken from and compared with the original records on file in this office.

Witness my hand and Official Seal, this 10th day of November, 1944.

MAUDE LEE BOLING,  
Ass't Clerk Superior Court.

### EXHIBIT "F"

### LIST OF HEIRS

Ella Moore Haggard, 44 Gillis Rd-Craddock, Portsmouth, Va.

Florence Crawford, Eldorado, N. C.

Chas. H. Crawford, Eldorado, N. C.

Mrs. Thomas Lee Cotton, Gonzaler, Texas.

H. F. Robinson, 1204 Ashboro St., High Pt., N. C.

Mary Hopkins, Burns, Ashboro, N. C.

Edna Hardison Morris, Eldorado, N. C.

Suda Russell Coffey, Jackson Creek, N. C.

R. W. Slate, High Point, N. C.

Jennie Hall, Thomasville, N. C.

Lulla Hopkins Smith, Denton, N. C., Star Rt.

Mrs. W. Vance Williams, Albemarle, N. C.

Mrs. J. R. Hill, Troy, N. C., Ophis Rt.

(Sadie B. Haithecock, Washington, D. C.)

George L. Haithecock, 139 Canal St., S. E. Zone 3)

W. E. Burgess.

Mrs. W. E. Burgess, Durham N. C.

C. M. Bishop Parker, 4209 County St., Portsmouth,  
Va.

Mrs. Carl Griffin, Green St., High Point, N. C.

Eula Drissom Luthes, Eldorado, N. C.

H. T. Grissom, Eldorado, N. C.

Jones M. Griffin, Rt. 4, Box 539, High Point, N. C.

J. M. Griffin, High Point, N. C.

E. K. Grissom, Troy, N. C. Ophis Rt.

Mary Ethel B. Stephens, Rt. 1, Raleigh, N. C.

Etture S. Thompson, 403 Liberty St., Durham, N. C.

Lillie Harris Cashalt, Box 473, Badin, N. C.

Oscar A. Griffin, Box 95, Thomasville, N. C.

N. E. Chandler, Thomasville, N. C.

R. A. Henderson, Saxapahaw, N. C.

Mrs. W. E. More, Rt. 1, Raleigh, N. C.

Wake C. Moore, Rt. 1, Raleigh, N. C.

Mrs. George Moore White, Raleigh, N. C.

Mrs. Thomas Moore Graham, Raleigh, N. C.

William D. Moore, Raleigh, N. C.

Clyde Moore Perry, Raleigh, N. C.

Ella Moore, Raleigh, N. C.

Eva Moore, Raleigh, N. C.

Claud Moore, Raleigh, N. C.

Charley Moore, Raleigh, N. C.

S. T. Dorthy, Rt. 2, Durham, N. C.

Mrs. Lucy Ball Dorthy, Durham, N. C.

Sophia J. Davis, 311 Kenedy St., High Point, N. C.

Walter Chambers, Rt. 1, Bahama, N. C. [55]

A. E. Chandler, Eldorado, N. C.

Alvin L. Chambers, Rt. 5, Box 283, Durham, N. C.

Mrs. Bulah Elam, Rt. 1, Candor, N. C.

Mrs. Carl Holt, Rt. 1, Albemarle, N. C.

Mrs. John F. Hill, Badin, N. C.

Auleva Davis Hicks, Box 514, Roxboro, N. C.

Mrs. Irvan Holcomb, Hamptonville, N. C.

Mrs. Melgum Hicks, Box 514, Roxboro, N. C.

Mrs. Alma Hopkins, Eldorado, N. C.

Mrs. Willie Moore Stephens, Raleigh, N. C.

Mary Louise Moore, Raleigh, N. C.

Edgar Moore, Raleigh, N. C.

John T. Moore, Raleigh, N. C.

Melgum Hicks, Roxboro, N. C.

Jimmy Hopkins, Eldorado, N. C.

Sandy Y. Hopkins, Thomasville, N. C.

Benson Hardister, Badin, Box 751.

Mrs. Clarence Averett, c/o New Method Laundry,  
Durham, N. C.

Clarence Everett.

Otho W. Bowling, Vesson Ave., Durham, N. C.

Victor B. Bolling, Vesson Ave., Durham, N. C.

Nellie Balkeum, 403 Short Smith St., High Point,  
N. C.

Victoria Griffin Stanley, High Point, N. C.

Mrs. V. E. Hayworth, High Point, N. C.

Oscar S. Griffin, High Point, N. C.

Mrs. Eva Moore Cash, 908 Brookland P. K. Bldg.,  
Richmond, (22) Va.

Winnie Davis, 311 Kennedy St., High Point, N. C.

Gary Davis.

Hal Hicks, 800 Carr St., High Point, N. C.

G. Max Harris, Box 2701, Winston-Salem, N. C.

Rodney E. Roach, Box 62, Lexington, N. C.

G. O. Pendergraph, Box 675, Waynesboro, Va.

Myrtle C. Deere, Albemarle, N. C.

Lizzie I. Nash, Albemarle, N. C.

Coya Chandler, Albemarle, N. C.

Grady Chandler, Albemarle, N. C.

Brad Chandler, Albemarle, N. C.

Reese Chandler, Albemarle, N. C.

B. E. Chandler, Albemarle, N. C.

Sandy Chandler, Albemarle, N. C.

B. A. Chandler, Albemarle, N. C.

Chas. Preston Griffin, 1090 Center St., Fayetteville,  
N. C.

Mrs. Henry McKee Miller, Rougement, N. C. Rt. 2

Glen Harris Mullinax, Eldorado, N. C.

Edward Dennie Chambers, 701 Kent St., Durham,  
N. C. [56]

Walter Knott.

Dewey Rouch Knott, 318 N. Church St., Moores-  
ville, N. C.

Mrs. Claud W. Fulk, Rt. 7, Winston-Salem, N. C.

Nellie Griffin Futrell.

S. E. Futrell, Rt. 1, High Point, N. C.

Lozella Freeman Page, 1108 Mulbery Rd., Martins-  
ville, Va.

Mrs. Ighigemia Freeman, 1108 Mulbery Rd., Mar-  
tinsville, Va.

Bulah Elem Walker, Rt. Box 109, Candor, N. C.

W. R. Smith, 900 Caldwell St., Statesville, N. C.



Verlie Griffin Boxley, 110 Dalton St., High Point,  
N. C.

Cassie Hopkins Crawford, Eldorado, N. C.

Zebb V. Russell, Dyer, Tenn.

H. L. Grissom, Eldorado, N. C.

(Paul A. Cecil, 511 W. Green St., High Point,  
N. C.)

Gilford E. Griffin, 511 W. Green St., High Point,  
N. C.

Lillian Griffin Davis, Rt. 1, Thomasville, N. C.

Annie Griffin Henderson, Rt. 1, Denton, N. C.

Mrs. Mary Griffin, 1201 English St., High Point,  
N. C.

Pauline Robbins, 1201 English St., High Point,  
N. C.

Harry S. Griffin, 1201 English St., High Point,  
N. C.

Norman Griffin, Rt. 5, Box 501, High Point, N. C.

Mrs. E. P. Walters, Timberlake, N. C.

L. T. Walters, Wake Forest, N. C.

Elishal L. Chandler, Highland St., High Point,  
N. C.

Clide Russell, Eldorado, N. C.

Sula Grissom Hill, Ophie Rt., Troy, N. C.

Pattie Hardison McKinney, Badin, N. C.

Millie Coggins Cagle, Eldorado, N. C.

Roy Coggins, Troy, N. C.

Paul D. Pendergraph, Hillsboro Rd., Chapel Hill,  
N. C.

Lizzie Hunt Rhew, 827 Mangum St., Durham, N. C.

N. Y. Rhew, Rougemont, N. C.

(Pauline Russell Overcash.

(H. H. Russell, 325 S. Sham St., Salisbury, N. C.  
Fred Oliver Roach, 413 Short St., High Point,  
N. C.

H. M. Roach, 710 West Green St., High Point,  
N. C.

Edith Roach, 413 Short Smith St., High Point,  
N. C.

Mrs. Brice Russell, 325 S. Shaver St., Salesbury,  
N. C.

(Moses H. Russell.)

(Stella Russell, 139 Carroll St., S. E. Washington,  
D. C.) [57]

(Asa Rhew.)

(Annie Rhew), Rougemont, N. C.

Molly W. Pendergraph, 809 W. Main St., Durham,  
N. C.

Maggie Robinson, 1106 Spruce St., Durham, N. C.

Mrs. C. L. Daniels, 1106 Spruce St., Durham, N. C.

Mrs. J. B. Walters, 1106 Spruce St., Durham, N. C.

Miss Vanger Walters, Broad St., Durham, N. C.

W. E. Latta, Arnette Ave., Durham, N. C.

Mabel Howell Brice, 713 Arnette Ave.,

James E. Howell, 713 Arnette Ave., Durham, N. C.

Eunice Latta Overton, Oxford, N. C.

Viola Latta Floyd, Rt. 2, Kittrell, N. C.

Emma Howell Latta, Durham, N. C.

Estele Latta, Durham, N. C.

Susan Brown, Durham, N. C.

Ruby C. Casey, 1122 Halbrook St., N. E. Wash-  
ington (2) D. C.

Melba Cathra Tilley, 302 Ballemly St., Durham,  
N. C.

- William S. Tilley, 302 Ballemly St., Durham, N. C.  
Mrs. W. A. Chambers, Rt. 1, Rougemont, N. C.  
Ida Yates, Rt. 5, High Point, N. C.  
Dr. W. A. Lackey, 507 Main St., High Point, N. C.  
J. A. Chambers, Rt. 2, Timberlake, N. C.  
M. G. Chambers, Rt. 2, Rougemont, N. C.  
L. C. Chambers, Rt. 1, Roxboro, N. C.  
(Sterling F. Chambers.)  
(W. C. Chambers), Timberlake, N. C. Rt. 1.  
Dr. P. J. Chest, Southern Pines.  
Sallie Lee Coggins Cobb, Rt. 2, New London, N. C.  
Roy H. Davis, P. O. Box 1211, Greensboro, N. C.  
Mrs. G. L. Haithcock, 159 Carroll St., S. E. Wash-  
ington (3), D. C.  
Florence Cranford, Eldorado, N. C.  
Helen McLawrin Blackwelder, 4712 Ralfe Rd.,  
Richmont, Va.  
Charlie Hertford Moore, Raleigh.  
Mrs. L. L. Lefler, Concord, N. C.  
Julian B. Davis, Baltimore, Md.  
Chas. B. Kearns, Troy, N. C.  
Rue Kearns Holton, Box 665, Thomasville, N. C.  
Vernon A. Kearns, Station C, High Point, N. C.  
Nina Kearns Cole, Troy, N. C.  
Patric Henry Cole, Troy, N. C.  
Patric Henry Cotten, 733 Arrington Ave., Rocky  
Mount, N. C.  
M. N. Dry, U. S. Army.  
Neese Williard, High Point, N. C.  
Dr. York, High Point, N. C. [58]  
Mrs. Julian Oakley, c/o Melgum Hicks, Roxboro,  
N. C.

J. Edgar Chambers, Rt. 1, Timberlake, N. C.  
Mrs. J. Herbert Bailey, 2301 Guess, R. Durham,  
N. C.  
Mrs. Ira T. Browning, Rt. 2, Durham, N. C.  
Eva Moore Cash, 908 E. Brockland, P. K. Blvd.,  
Richmond, Va.  
Lucy Ball Dorthy, Rt. 2, Durham, N. C.  
Velma J. Dorthy, Rt. 2, Durham, N. C.  
Mrs. Thomas Graham, Rt. 12, Raleigh, N. C.  
H. B. Hunt, 321 Manpin Ave., Salisbury, N. C.  
L. T. Hunt, 2407 Albuy St., Durham, N. C.  
L. A. Hunt, 2426 Guest R., Durham, N. C.  
Robert H. Hunt, Rt. 2, Durham, N. C.  
W. S. Hunt, Rt. 2, Durham, N. C.  
C. P. Hunt, 2440 Guest R., Durham, N. C.  
Pervis P. Hunt, Rt. 2, Durham, N. C.  
W. W. Hunt, 1106 8th St., Durham, N. C.  
A. S. Hunt, 803 Kenney St., Durham, N. C.  
C. W. Hunt, 1000 Brood St., Durham, N. C.  
Mrs. W. E. Herring, Durham, N. C.  
Mrs. I. E. Hill, Thomasville, N. C.  
Lillie Harris, Box 473, Bailin, N. C.  
Vana Henderson, Sarapahan, N. C.  
A. Davis Hick, 311 Kennedy S., High Point, N. C.  
Lula Russell Coppage, Jackson Creek, N. C.  
G. E. Peeler, 125 Commerce St., High Point, N. C.  
J. D. Suggs, West Green St., High Point, N. C.  
C. L. Surratt, Denton, N. C.  
Mrs. George White, Rt. 1, Raleigh, N. C.  
Dr. J. W. Slate, High Point, N. C.  
Myrtle C. Deere, Albemarl, N. C.

[Endorsed]: Filed May 2, 1947. [59]

[Title of District Court and Cause.]

## FIRST ADMENDMENT TO PLAINTIFFS' COMPLAINT

Now come the plaintiffs above named, and by leave of Court first had, file this as their first Amendment to plaintiffs' Complaint on file herein, as follows:

### I.

Amend the title to said complaint by adding the names, Fong May Ngo, sued herein as First Doe, and by adding the name of William Penix, sued herein as Second Doe, and by striking out the name Sacramento Investment Company, a Corporation, and inserting in lieu thereof the name Tsugi Take-moto, by striking out the name Gertrude Kahn and inserting the name Lazarus Kahn, and [60] by striking out the word "Railroad" in the name "Central Pacific Railroad Company" in the title and inserting in lieu thereof, the word "Railway."

### II.

Strike out Paragraph 6 of said Complaint.

### III.

Amend Paragraph 9 of said Complaint by striking out the name of "Sacramento Investment Company, a Corporation" wherever it appears in said Complaint, and insert in lieu thereof, the name Tsugie Takemoto.

### IV.

Strike out the name "Gertrude Kahn" wherever it appears in said Complaint, and insert in lieu thereof, the name Lazarus Kahn.



## V.

Amend Line 15 on Page 27 of Paragraph 50 of said Complaint, by striking out the figure "6" and insert in lieu thereof, the figure "5".

## VI.

Amend Line 18, Page 27, Paragraph 51 of said Complaint, by inserting after the figure "4" the letters and figures "K" and "L" and "4th" and "5th" Streets.

## VII.

Amend Line 20, Page 8, by striking out the word "Eastern" and insert in lieu thereof, the word "Western."

## VIII.

Amend the typographical error in Lines 29 and 30, Page 9, so that the name shall be Donner Lumber and Broom Company.

## IX.

Strike out Paragraph 8, Page 3, and insert in lieu thereof, the following:

The Central Pacific Railway Company, a Corporation, doing [61] business at No. 65 Market Street, San Francisco, California, with its principal office located in Salt Lake, Utah. That the Central Pacific Railway Company, a Corporation, is the successor in interest of the Central Pacific Railroad, a Corporation, and acquired title to all properties formerly owned by the Central Pacific Railroad Company, a Corporation, prior to the expiration of the Charter of said Central Pacific Railroad Company, a Corporation, and assuming all its debts and liabilities; That the said Southern Pacific Rail-

road Company leases and operates all the property of the Central Pacific Railway Company, and is the Alter Ego of the said Central Pacific Railway Company and Central Pacific Railroad Company.

X.

Amend Paragraph 63, Page 32, by striking out the word "Railroad" wherever it appears in said Paragraph and insert in lieu thereof, the word "Railway."

XI.

Amend Paragraph 68, Page 33, by striking out the word "Railroad" in the name Central Pacific Railroad Company, and insert in lieu thereof, the word "Railway" so that the name shall read, Central Pacific Railway Company.

Dated: September 10th, 1947.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
WALTER H. SILER,  
CARLYLE E. HIGGINS,  
Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed Sept. 10, 1947. [62]

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[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Now come the plaintiffs in the above entitled action, with leave of Court first had and obtained and file this as an amendment to Paragraph 16 of their complaint, by adding to said Paragraph 16,

after the word "estate," in line 28, page 5, the following:

That said Superior Court exceeded its jurisdiction in the appointment of said Moses Hopkins as Administrator of the Estate of Mark Hopkins, deceased, in this, that the said Moses Hopkins, under the name of Moses T. Hopkins, had been, on the 12th day of September, 1845, in the Superior Court, in the County of Orange, State of North Carolina, convicted of an infamous crime, to wit: the crime of Grand Larceny, and the said purported Order of the Superior Court in and for the City and County of San Francisco, State of California, appointing said Moses Hopkins Administrator was null and void and of no force and effect, and all acts of said purported administration in the purported administration of said estate were and are null and void and of no effect. That the said Moses Hopkins, named in said purported Order appointing him Administrator of the Estate of Mark Hopkins, deceased, is the same person who was convicted of the crime of Grand Larceny, under the name of Moses T. Hopkins.

Dated: February 20, 1948.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
WALTER H. SILER,  
CARLYLE E. HIGGINS,  
Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed March 1, 1948. [65]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS  
COMPLAINT

To: the plaintiffs above named, and to Messrs. Busick & Busick, Charles H. Seccombe, Esq., S. J. Bennett, Esq., Walter H. Siler, Esq., and Carlyle Higgins, Esq., their attorneys: [66]

You and each of you will please take notice that the defendants Ira Jones, Claude A. Beagle, Vera G. Beagle, Roger L. Bondi, Marie Bondi, Joseph Devincenzi, Matilda Devincenzi, Verne Lewis, Vera M. Lewis, Drusilla N. Peip and Fred Bardoni, Sacramento Investment Company, a corporation, Vera Peniz, Jennie T. Stoll, Fred Fong, Grace Lee, Confucius Church of Sacramento, a corporation, Armade Zambra, also known as Vicente Armanda Zambra, Charles S. Howard Company, Inc., John V. Noonan and Jean Lillard, on August 18th, 1947, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, will move the above entitled court at its court room in the court house, Post Office Building, City of Sacramento, State of California, to dismiss the above entitled action, and each and every count thereof.

Said motion will be made on the following grounds as to the entire complaint and each and every count thereof.

1. That the allegations set forth in the bill of complaint are insufficient to state a cause of action in favor of the plaintiffs or in favor of any of

the persons on whose behalf this action is brought against the defendants or any of them.

2. That the allegations set forth in the bill of complaint are insufficient upon which to base any equitable relief in favor of the plaintiffs or in favor of any of the persons on whose behalf said action is brought against the defendants or any of them.

3. That it appears by said bill of complaint that the causes of complaint are stale and that the plaintiffs and their ancestors have been guilty of gross laches and that so long a time has elapsed since the matters and things complained of took place that it would be contrary to equity and good conscience for the court to take cognizance thereof.

4. That it appears from affidavits filed with this motion and from the certified copies of documents attached thereto that the cause or causes of complaint are stale and that the plaintiffs and their ancestors have been guilty of gross laches and that they and their ancestors were appraised of the facts alleged in the complaint for a great many years prior to the filing of said bill of complaint.

5. That it appears from the allegations set forth in said bill of complaint that insofar as said bill seeks relief on the ground of fraud that the alleged cause of complaint has become barred by the statute of limitations and particularly by Section 338, Subdivision 4 thereof, of the Code of Civil Procedure of the State of California.

6. That it appears from the allegations of said bill of complaint that insofar as said bill of complaint seeks to determine title to real property that



the alleged cause of complaint is barred by the statute of limitations and particularly by Section 318 of the Code of Civil Procedure of the State of California.

7. That it appears from the allegations of said bill of complaint that insofar as said bill of complaint seeks to determine title to real property that the alleged cause of complaint is barred by the statute of limitations and particularly by Section 319 of the Code of Civil Procedure of the State of California.

8. That said bill of complaint fails to state a cause of action in law or in equity against the defendants or any of them in that it fails to allege that the plaintiffs or any of them or any of those persons on whose behalf said action is brought were the heirs of Mark Hopkins at the date of his death or that they or any of them have succeeded to the interest of any of said heirs. [68]

9. That said bill of complaint fails to state a cause of action against the defendants or any of them on the ground of fraud in that it fails to allege that the defendants or any of them were guilty of any of the fraudulent acts complained of in said bill of complaint or that said defendants or any of them had any knowledge of said fraud at any time and that said defendants or any of them had knowledge of any facts which should have put them upon inquiry.

10. That insofar as said bill of complaint seeks to have this court determine who were in fact the heirs of Mark Hopkins, deceased, said bill of com-

plaint fails to state a claim within the jurisdiction of this court.

11. That insofar as said bill of complaint seeks relief on the ground that the decree of final distribution in the Estate of Mark Hopkins, deceased, was void on its face, said bill of complaint fails to state a claim against the defendants or any of them.

12. That insofar as said bill of complaint seeks to have this court appoint an administrator do bonis non said bill of complaint fails to state a claim within the jurisdiction of this court.

13. That insofar as said bill of complaint seeks relief on the ground that the administrators of the Estate of Mark Hopkins, deceased, failed to disclose to the Probate Court in the administration of the Estate of said Mark Hopkins, deceased, certain properties belonging to the estate of Mark Hopkins, deceased, or on the ground that certain property belonging to Mark Hopkins, deceased, were not administered upon by the probate court administering his estate said claim has been determined adversely to the plaintiffs and the persons on whose behalf said action is brought by a **final judgment of [69]** the District Court of the United States for the Northern District of California, Southern Division, in the case of Freeman, et al., vs. Hopkins, et al., No. 1842-Equity.

14. That insofar as said bill of complaint seeks to state a cause of action in equity against the defendants or any of them on the grounds of extrinsic fraud in the procurement of the decree of

distribution in the matter of the Estate of Mark Hopkins, deceased, said bill of complaint fails to state a cause of complaint.

15. That the complaint fails to state a claim upon which relief can be granted in this: the complaint fails to show that the decree of distribution rendered in the Estate of Mark Hopkins was void on its face, it affirmatively appearing from copy of said decree annexed to the complaint as Exhibit A that said decree was not void; and said complaint fails to contain any allegations of facts constituting extrinsic fraud on the part of Moses Hopkins or Mary Frances Sherwood Hopkins, or their heirs or successors in interest.

16. That the complaint fails to state a claim upon which relief can be granted in this: that it appears from the face of said complaint that the matter is *res adjudicata*, petition for letters of administration *de bonis non* upon the Estate of Mark Hopkins, deceased, having been filed in the Superior Court of the State of California, in and for the City and County of San Francisco, on January 27th, 1947, and denied on March 19th, 1947, and that said denial of said petition is now final.

17. That the court lacks jurisdiction over the subject matter. [70]

18. That the court lacks jurisdiction over persons who are necessary and indispensable parties to said action, that is to say, that the heirs and successors in interest of Moses Hopkins and Mary Frances Sherwood Hopkins, necessary and indispensable parties to said action, are not included

among either the plaintiffs or the defendants therein, and the court lacks jurisdiction over them herein.

19. That the allegations of paragraphs 14, 15, 17, 18, and that portion of the complaint starting with line 20 and ending with line 50, page 13, and paragraphs 23, 28, 29, 30, 32, 33 and 34 of said complaint are mere conclusions of law and not statements of ultimate facts.

20. That it does not appear from paragraphs 27, 28 and 29, under what circumstances the plaintiffs, or their ancestors, first learned of or discovered the so-called alleged fraud of Mary Frances Sherwood Hopkins and Moses Hopkins.

21. That it does not appear from said complaint whether or not the alleged ancestors in interest of the plaintiffs had knowledge of the probate proceedings in the estate of Mark Hopkins prior to 1945.

22. That the decree attached to said complaint and marked "Exhibit E" is of no force and effect because the same is not binding on the courts of the State of California. The Superior Court of the State of California, sitting in probate, is the only court having jurisdiction to determine to whom the property of a party dying a resident of the State of California should go to, and who are the heirs of said decedent.

23. That the claims of these plaintiffs are stale.

24. That the plaintiffs and their ancestors are guilty of laches.



25. That the complaint and each count thereof is barred by laches. [71]

26. That the plaintiffs and their ancestors in interest had full knowledge of the alleged fraud at least as early as 1925, as will more fully appear from the affidavit of Royal E. Handlos filed herewith, and the exhibits attached thereto.

27. That the complaint fails to allege the knowledge, or lack of knowledge, or the lack of means of knowledge of the ancestors of the plaintiffs of the pendency of the probate proceedings in the estate of Mark Hopkins, and of the alleged fraud in the distribution thereof.

28. That the complaint fails to allege the knowledge, or lack of knowledge, or the lack of means of knowledge of the pendency of the probate proceedings in the estate of Mark Hopkins, and of the alleged fraud in the distribution thereof by those designated in the complaint as the brothers and sisters of the decedent.

29. The complaint fails to allege the relationship the plaintiffs have to those referred to in the complaint as the brothers and sisters of Mark Hopkins, deceased, and fails to allege whether or not any of the parties referred to in the complaint were entitled to distribution of any part of the estate.

The said motion will be based upon this notice, the affidavit of Royal E. Handlos, attorney for certain of the defendants, and the exhibits attached to said affidavit, the records of this court in the action in equity, No. 1842 therein, entitled "Norman Lee Freeman, for himself and others similarly



situated, plaintiff, vs. Timothy Nolan Hopkins, alias, et al., defendants, filed in the Southern Division of the United States District Court for the Northern District of California, on February 25th, 1927, oral and documentary [72] evidence to be adduced at said hearing, and all records, pleadings and files in said action.

Dated: July 30th, 1947.

ROYAL E. HANDLOS,

Attorney for Ira Jones, Claude A. Beagle, Vera G. Beagle, Roger L. Bondi, Marie Bondi, Joseph Devincenzi, Matilda Devincenzi, Verne Lewis, Vera M. Lewis, Drusilla M. Peip and Fred Bardon.

LANDELS & WEIGEL,

By LANDELS & WEIGEL,

Attorneys for Vera Peniz, Charles S. Howard Company, Inc., John V. Noonan and Jean Lillard.

LANDELS & WEIGEL,

By LANDELS & WEIGEL,

and

DRIVER, DRIVER & DRIVER,

By PHILIP F. DRIVER,

By DRIVER, DRIVER & DRIVER.

Attorneys for Grace Lee, Fred Fong and Armade Zambra, also known as Vicente Armada Zambra.

DRIVER, DRIVER & DRIVER,

By PHILIP F. DRIVER,

By DRIVER, DRIVER & DRIVER.

Attorneys for Confucius Church of Sacramento, a corporation.

J. FRANCIS O'SHEA,

Attorney for Jennie T. Stoll.

T. L. CHAMBERLAIN,

Attorney for Sacramento Investment Company, a  
corporation. [73]

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 31, 1947.

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[Title of District Court and Cause.]

AFFIDAVIT OF ROYAL E. HANDLOS IN  
SUPPORT OF MOTIONS TO DISMISS

State of California,

City and County of San Francisco—ss.

Royal E. Handlos, being first duly sworn, deposes  
and says:

That he is the attorney for the defendants Ira Jones, Claude A. Beagle, Vera G. Beagle, Roger L. Bondi, Marie Bondi, Joseph Devincenzi, Matilda Devincenzi, Verne Lewis, Vera M. Lewis, Drusilla N. Peip and Fred Bardoni, and is more familiar with the facts hereinafter averred than the said defendants, and of the other defendants appearing in the said action by and through their respective counsel, and for that reason makes this affidavit for and on behalf of these defendants and all other defendants represented by counsel on the motion or motions to dismiss.

That it is alleged in the complaint on file herein that the plaintiffs first discovered their alleged

causes of action in 1945 (Paragraphs 22, 28 and 29 of said complaint, pages 14, and 17 thereof); that for some years last past affiant has been familiar with the proceedings had and taken in the Superior Court of the State of California, in and for the City and County of San Francisco, in the matter of Mark Hopkins, deceased, which said proceedings are numbered 38991 Probate, 160506 Civil, 100219 Probate and 105869 Probate; that in all of these proceedings herein referred to attacks were made upon the decree of final distribution entered in the original estate proceedings November 1st, 1883, which said decree of final distribution was signed by J. V. Coffey, Judge of the Superior Court; that all of the records of the original proceedings had and taken in the matter of the estate of Mark Hopkins, deceased, were destroyed in the general conflagration of the City of San Francisco, State of California, on April 18th, 1906.

That in proceedings had in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered 38991, one P. B. McCandless filed a petition for letters of administration with the will annexed, and on the same date a document purporting to be the last will of Mark Hopkins, deceased, was filed. Thereafter on August 28th, 1926, a document entitled "Answer and Petition" was filed in said proceedings; that among the petitioners filing the said answer the following are named, to wit: Jones M. Griffin, Alvin L. Chambers, William Anderson Cothran and Susan Ann Vaughn Cothran; that attached hereto

and made a part of this affidavit and marked "Exhibit A" is a certified copy of said answer and petition.

That thereafter in the said proceedings numbered 38991 an order dismissing petition for probate of will was filed December 16th, 1926. A certified copy of this order is attached hereto, made a part hereof, and marked "Exhibit B."

That on February 25th, 1927, James H. Longden, the attorney for petitioners in the answer and petition filed August 28th, 1926, filed a dismissal of the contest. A certified copy of this dismissal is attached hereto, made a part hereof, and marked "Exhibit C."

That on October 18th, 1930, one Norman Lee Freeman, who also joined in the answer and petition hereinabove referred to, filed a petition for letters of administration de bonis non. His attorney of record was James Henry Longden. That attached hereto, made a part hereof, and marked "Exhibit D" is a certified copy of the said petition for letters of administration de bonis non.

That on October 25th, 1930, the said James H. Longden filed a dismissal of said petition. A certified copy of said dismissal is attached hereto, made a part hereof, and marked "Exhibit E."

That on November 21st, 1930, one Lela Pink Martin filed a petition for letters of administration de bonis non. That James H. Longden appeared as attorney of record for the said petitioner; that on March 2nd, 1931, said James H. Longden filed a dismissal of said petition. A certified copy of said

dismissal is attached hereto, made a part hereof, and marked "Exhibit F."

That on August 19th, 1925, Jones M. Griffin and others filed in the Superior Court of the State of California, in and for the City and County of San Francisco, a document entitled, "Petition in Equity," entitled "In the Matter of the Estate of Mark Hopkins, Deceased, No. 8494," which said petition in equity is numbered 160506 in the files of said County Clerk; that the attorney of record for said petitioners was James H. Longden. A certified copy of said petition in equity is attached hereto, made a part of this affidavit, and marked "Exhibit G."

That thereafter and on February 25th, 1927, the said James H. Longden, as attorney for said petitioners, filed a dismissal. A certified copy of said dismissal is attached hereto, made a part hereof, and marked "Exhibit H."

That thereafter and on July 27th, 1945, Alvin Chambers and Jones Griffin, appearing for themselves and for all other legal heirs of the above named decedent, filed a petition to vacate and set aside the decree of final distribution entered in the matter of the estate of Mark Hopkins, deceased, November 1st, 1883; that this petition was addressed to the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered 100219 therein. A certified copy of said petition is attached hereto, made a part hereof, and marked "Exhibit I."

That thereafter Wells Fargo Bank & Trust Co.



and others appearing specially for the purpose of objecting to the jurisdiction of the court to hear said petition, moved to dismiss said petition; that said motion was duly argued and submitted, and thereafter on June 10th, 1946, the court made its order dismissing the proceedings for lack of jurisdiction. A certified copy of said minute order is attached hereto, made a part hereof, and marked "Exhibit J."

That thereafter in said proceedings No. 100219 an order for withdrawal of certain affidavits was filed January 13th, 1947. This order authorized the withdrawal of certain original affidavits filed with the Clerk of said Court February 23rd, 1946; that among the affidavits so withdrawn were two affidavits of Alvin L. Chambers, affidavit of Estella Cothran Latta and affidavit of Jones M. Griffin. That attached hereto, made a part of this affidavit, and marked "Exhibit K" is a certified copy of said order for withdrawal of certain affidavits, which contains the affidavits of Alvin L. Chambers, Estella Cothran Latta and Jones M. Griffin.

That on January 28th, 1947, in the Superior Court of the State of California, in and for the City and County of San Francisco, in the Matter of the Estate of Mark Hopkins, deceased, in a proceeding numbered 105869, a petition for letters of administration de bonis non was filed by John T. Blount. A certified copy of said petition is attached hereto, made a part of this affidavit, and marked "Exhibit L."

That the said petition came on regularly for hearing by the court on March 19th, 1947; that on that said March 19th, 1947, the court denied the said petition of John T. Blount. A certified copy of said minute book order is attached hereto, made a part hereof, and marked "Exhibit M."

That in addition to the proceedings had and taken in the Superior Court of the State of California, in and for the City and County of San Francisco, on September 30th, 1931, Norman Lee Freeman filed a petition for letters of administration de bonis non, in the Superior Court of the State of California, in and for the County of Sacramento, in the Matter of the Estate of Mark Hopkins, Deceased, which said proceedings are numbered 14987 therein; that appearing for said petitioner as attorney of record is James H. Longden. **A certified copy of said petition** is attached hereto, made a part of this affidavit, and marked "Exhibit N."

That the said petition came on regularly for hearing before the said court on November 9th, 1931, and the said court entered its order denying the said petition. A copy of said order of said court is attached hereto, marked "Exhibit O," and made a part hereof.

That on February 25th, 1927, a complaint in equity was filed in the Southern Division of the United States District Court, of the Northern District of California, entitled "Norman Lee Freeman, for himself and others similarly situated, plaintiff,

vs. Timothy Nolan Hopkins, alias, et al., defendants,” and numbered 1842 in the records of said court. That attached to said complaint in equity is an “Exhibit A” which purports to contain the names of the others similarly situated as the said plaintiff; that among the names so listed in said “Exhibit A” are Alvin Luther Chambers, Durham Co., North Carolina, Jones M. Griffith, Guilford Co., North Carolina, which affiant is informed and believes and therefore alleges is a misprint and should be Jones M. Griffin, and bases his information and belief on the affidavit of Jones M. Griffin attached to “Exhibit K” of this affidavit, which affidavit specifically alleges that Jones M. Griffin resides in Guilford County, North Carolina, and William Anderson Cothran, Person Co., North Carolina, and Susan Ann Cothran, Person Co., North Carolina; that affiant is informed and believes and therefore alleges that the last two persons named are respectively the father and mother of the plaintiff in this action Estella Latta; that affiant bases his information and belief upon the affidavit of Estelle Cothran Latta which is attached to and made a part of “Exhibit K” of this affidavit.

That affiant herein refers to the original records of this court in the action of Freeman vs. Hopkins and numbered 1842-Equity, and makes the said record a part of this affidavit.

That Jones M. Griffin is named as one of the parties answering the petition for the probate of the will in Probate No. 38991 above, and in the

proceedings in equity No. 160506, "Exhibit A" and "Exhibit G" respectively; that Susan Ann Vaughn Cothran and William Anderson Cothran are parties to the answer and petition filed in proceedings No. 38991, "Exhibit A" attached to this affidavit; **that Alvin Chambers** is a party to the answer and petition filed in proceedings No. 38991; that affiant is informed and believes and therefore alleges that Jones M. Griffin, named in said answer and petition, "Exhibit A," is one and the same as Jones M. Griffin, one of the plaintiffs in this action; that **Alvin L. Chambers, named in said answer and petition**, "Exhibit A" is one and the same person as Alvin Chambers, who is described in paragraph 34 of the complaint, page 19, as Alvin Chambers, one of the plaintiffs herein; that Estella Latta, one of the plaintiffs in the above entitled action, is the same person as Estelle Cothran Latta, who made the affidavit attached to "Exhibit K" of this affidavit.

That affiant bases his information and belief as to the identity of the plaintiffs Jones M. Griffin and Alvin Chambers as being the same parties referred to in "Exhibit A," and as to Jones M. Griffin also "Exhibit G," upon the affidavits of the said parties attached to "Exhibit K" of this affidavit.

That affiant bases his information and belief as to the identity of the plaintiff Estella Latta being Estella Cothran Latta and the daughter of William Anderson Cothran and Susan Ann Vaughn Cothran upon the affidavit of the said Estelle Cothran Latta, a part of "Exhibit K" of this affidavit, and also



upon the allegations of paragraph 34 of the complaint, page 19, where it is alleged "Estelle Cothran Latta is a direct descendant of James Hopkins, a brother of said Mark Hopkins."

That all of the Exhibits attached to this affidavit show that the plaintiffs in this action and their ancestors had full knowledge or means of knowledge of all of the alleged fraudulent acts set forth in said complaint, and had knowledge of the facts sufficient to put them upon inquiry as to such matters alleged and referred to in said complaint for more than twenty years last past.

That an examination of the names of the petitioners in "Exhibit A" and "Exhibit G" attached hereto, and in "Exhibit A" attached to the bill in equity in the action of Freeman vs. Hopkins, No. 1842-Equity in this court, shows that more than 175 names are readily identifiable with the names set forth in "Exhibit F" attached to the complaint in this action; that among the names so appearing are the names of Jones M. Griffin, Alvin L. Chambers, William Anderson Cothran and Susan Ann Vaughn Cothran, the ancestors of Estella Latta, also known as Estelle Cothran Latta; that a comparison of the names of the alleged heirs listed in equity suit No. 1842 and in this present action shows that nearly all of the names appearing in the list in the present action correspond to names appearing in the bill in equity No. 1842.

That in the petition filed in proceedings No. 100219, "Exhibit I" attached to this affidavit, in



paragraph 25 it is alleged in part as follows: (Pages 11 and 12 of Exhibit I)

“That in 1925, or thereabouts, your petitioners were informed that they had an interest in the estate of their relative, Mark Hopkins, of California, consisting of real and personal property, the exact amount and location of which were unknown to your petitioners. That thereupon said petitioners employed representatives and counsel and contributed funds for the purpose of locating and determining the estate of Mark Hopkins and of investigating and enforcing their legal rights thereto. That they were informed from time to time by their said counsel that all available legal steps were being taken, and that it was only a matter of time until their legal rights would be judicially determined and the said estate would be closed. That said heir claimants believed and relied upon their said counsel and representatives and continued so to believe until 1943, or thereabouts; that at said time plaintiffs, having lost confidence in the said representation referred to above, employed other counsel to investigate and to advise as to what had been done and what could be done in the matter of their legal rights as heir claimants to the estate of said decedent. That upon such investigation it was discovered that no proper legal steps had been taken towards the recovery of said estate, and that in fact certain actions had been commenced in the above entitled court to that end and without the knowl-

edge of consent of petitioners or any other heir claimants, and had been withdrawn.”

Affiant avers that the minute order denying the petition of Alvin Chambers and Jones Griffin, filed June 10th, 1946, and dismissing the proceedings for lack of jurisdiction has become final.

That the order denying petition for letters of administration de bonis non filed by John T. Blount, which said order was filed March 19th, 1947, “Exhibit M” attached to this affidavit, has become final.

That in the action of Freeman vs. Hopkins, United States District Court, Northern District of California, Southern Division, No. 1842-Equity, an appeal was taken by the plaintiff to the Circuit Court of Appeals, Ninth Circuit, from the order dismissing the proceedings, which order was made on motion of the defendants; that the said Circuit Court of Appeals, Ninth Circuit, on May 6th, 1929, in case No. 5672, affirmed the judgment of the lower court; that the opinion of the said Circuit Court of Appeals is reported in 32 Fed. Rep. 2d. Series, page 756.

That under the laws of the State of California in effect at the time of the probating of the estate of Mark Hopkins, deceased, in 1878 to 1883, said laws provided for notice of the hearing of the petition for letters of administration by posting in three public places in the county in which the proceedings were pending, and on a petition for final distribution the law during those years provided

for notice of the hearing of said petition for final distribution to be given by posting in three public places in the county. That the decree of distribution in the estate of Mark Hopkins, deceased (Exhibit A attached to Exhibit I of this affidavit) recites that the petition came on regularly to be heard, proof having been made to the satisfaction of the court that the Clerk had given notice of the settlement of the account and the hearing of the petition for the time and in the manner theretofore ordered and directed by the said court.

That on April 18th, 1906, there was a general conflagration in the City and County of San Francisco, State of California. In that conflagration all of the records of the office of the County Clerk, including all of the records of the Superior Court of the State of California, in and for the City and County of San Francisco, were destroyed by fire; that among the records so destroyed were the records and files of said Superior Court showing the administration of the estate of Mark Hopkins, deceased; that the records in the matter of said estate have not been restored under the so-called "Destroyed Court Records Relief Law of 1906" (Deering's General Laws, Act 1028), or under any other law of the State of California, or otherwise, or at all; that it is impossible to ascertain at this time from any records what actions, steps or proceedings were taken in the matter of said estate, although it is possible to ascertain the full and com-

plete terms of the decree of final distribution entered in said estate through certified copies which were recorded in various counties, including the County of Sacramento; that a certified copy of the decree of distribution in the matter of the estate of Mark Hopkins, deceased, was recorded in the Recorder's office of the County of Sacramento, State of California, on April 7th, 1884, at 11:45 A. M. in Book 112 of Deeds, at page 537.

That the delay in bringing this proceeding until 64 years after the entry of the decree of distribution, and 41 years after the general conflagration in the City and County of San Francisco, makes it impossible for the defendants in this action to obtain the testimony of any person who was familiar with the said proceedings or the family affairs of Mark Hopkins prior to and at the time of his death, and as to the personal relationships of others to him at that time, and has impaired the ability of the defendants in this action to secure authoritative evidence necessary to them in the defense of this action, and will result in substantial prejudice to them herein.

Affiant further avers that it affirmatively appears from the exhibits attached to this affidavit that the plaintiffs herein, and their ancestors and the other persons described in "Exhibit F" attached to the complaint on file herein, are guilty of gross laches, and the persons referred to in the other exhibits

attached to this affidavit are guilty of gross laches, and are not entitled to relief in equity.

/s/ ROYAL E. HANDLOS.

Subscribed and sworn to before me this 29th day of July, 1947.

(Seal) /s/ JANE O'CONNOR,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the foregoing Affidavit of Royal E. Handlos is hereby admitted this 31st day of July, 1947.

/s/ BUSICK & BUSICK,

/s/ CHARLES H. SECCOMBE,

/s/ S. J. BENNETT,

/s/ WALTER H. SILER,

/s/ CARLYLE HIGGINS,

Attorneys for Plaintiffs.

EXHIBIT "A"

Superior Court

No. 38991

State of California,

City and County of San Francisco—ss.

In the Matter of the Estate of Mark Hopkins,  
Deceased.

### ANSWER AND PETITION

John Marshall Jones Freeman, W. Percy McCanless, O. Eugene McCanless, Harry McCanless,



Daisy McCanless Davis, Gertrude McCanless Devlin, Eva McCanless Hinckley, Zebedee V. Russell, Mary Virden Johnson Russell, Hattie Olga Russell Houston, Augusta Leona Russell Muecke, Preston S. Griffin, Freda Coggins Fogleman, Boston Hopkins, Sadie Russell Heathcock, Frederick Coggins, Charles L. Coggins, Ray Coggins, Hattie Coggins Cobb, Claudie Russell Russell, Mittie Coggins Cagle, Louise Harris Russell, James Russell, Stella Saunders Grissom, Crissie Hopkins Cranford, Dora Saunders Hardester, Sula Russell Kopplemyer, Norman Lee Freeman, Addie Lou Freeman, Annie Blanche Freeman, Horace L. Freeman, Hattie Corinne Freeman Stedman, John Marshall J. Freeman, Patrick H. Cotton, Harris Russell, Jones M. Griffin, Charles Griffin, Victoria Griffin Stanley, Nellie Griffin Trotter, Hattie Griffin Roach, Burl Wood Griffin, Carl Griffin, Edde Hopkins Russell, Sandy Y. Hopkins, Oscar S. Cranford, Ida Hopkins Cranford, Guardian for 7 heirs:—(Ravon, Elsie, Vernon, Buren, Helen, Hazel, and Viola Cranford) Jennie Harris Hall, Elijah Allen Hardester, Van Harris Hall, Harvey Ciggins, Edna Hardester Morris, Margaret Harris, Glenn Harrise Mullinex, Nellie Moyle Brown, Ethel Moyle, Mary Moyle, Sadie Moyle Suggs, Agnes Hardester Hold, Florence Walker Cranford, Oscar W. Freeman, Lorena Walker Lefler, Alma Walker Hopkins, Mary Perkins Vancel, Mattie Hopkins Kline, Dora Hopkins Harden, L. V. Hopkins, J. T. Chambers, . . . . . Chambers, Rebecca Riggs Tilley, Felix M. Umstead, John Umstead, Myrtle Umstead, John W. Riggs, Henry

A. Riggs, Rebecca Riggs, E. B. Riggs, William R. Riggs, James P. Riggs, J. C. Chambers, J. E. Chambers, Crissie Hopkins Steed, Callie Harris, H. W. Harris, John Riggs, Rosa Tilley, Zebedee Tilley, Kouis Benjamin Hopkins, L. D. Coggins, Moses E. Cotton, Roscoe M. Kearns, Thomas L. Cotton, Solon A. Cotton, Mrs. J. T. Cotton, individually and as Guardian for Hazel Cotton and Ava Joe Cotton, Grace Morris, individually and as Guardian for Max Morris; Frederick Morris, Jasper Morris, Shelton Morris, Mary J. Cates, Lee E. Eggs, Lundy L. Umstead, Jr., Bedford V. Riggs, Cera Riggs Wilkins, Corrinna Riggs Jacobs, Mary Ellen Riggs Williams, Annie Booth Walters Keith, Ina Mildred Walters Wagstaff, Susan and Vaughn Cothran, Rosa B. Walters Harris, William Anderson Cothran, William C. Walters, Calvin Walters, Mary K. Walters Pendergraft, James T. Walters, George Daniel Walters, William H. Walters, Mallie Walters Allen, John Walters, Addie Bell Nevilles, Edward Picket Walters, Thomas Bailey, William Bailey, Samuel Bailey, Otho Williams Hopkins, Annie Hopkins, Lucy Vaughn Maddox, Sarah Button McGowan, Ward S. Walters, J. F. Walters, Farland C. Porterfield, Minnie P. Blanchard, K. W. Harris, Beulah Walker, Elam Harrise Griffin, Lulu Grissom Hill, Beulah Grissom Luther, Fayette Grissom, Parthena Harris Chandler, Benson Asbury Hardister, Lillie Harris Cashatt, Battie Ray Hardister, Fannie Harrise Taylor, Rena Hardister Hill, Luella Hardister Smith, Martha Hopkins Sexton, Lavinna Hopkins, Lemont Hopkins,

Eli W. Harris, William Rex Smith, Maggie Dickerson, Rosanna Riggs Jones, Henrietta Riggs, George Riggs, John Dunnigan Leathers, Nora Dunn Chambers, J. G. Chambers, J. O. Chambers, Alvin L. Chambers, Isham Chambers, Mary Chambers Cash, Charles Johnson Clayton, Hardy Freeman Clayton, Lavada Clayton Brown, Samuel P. Chambers, Annie Maude Porterfield, George F. Porterfield, Silas J. Porterfield, Ralph B. Porterfield, Charles William Hunt, Luetta Emma Hunt, Susan Mebane Hunt, Samuel Hoke Hunt, John Alvis Hunt, Lucy Bell Hunt Dorothy, Samuel W. Hunt, Lawless T. Hunt, Annie Lee Hunt Browning, Luther A. Hunt, Charles P. Hunt, Robert H. Hunt, Walker W. Hunt, Nora O. Hunt, Pervis P. Hunt, Claudie B. Hunt, Joseph Hunt, Lizzie M. Hunt Rhew, Minnie M. Hunt Whitaker, Ruthie Dalman Leighton, Mallic Hunt, Martha Hunt, George Hunt, Clarence Hunt, Lillie Hunt, John Arthur Vaughn, Clyde Hunt, Arthur Hunt, Margaret Hunt, Homazel Hunt, Fannie Walters McKee, Rosa Walters Monk, and John Marshall Jones Freeman for all other proper heirs of the estate, answering the petition of P. B. McCanless requesting the probate of an alleged will of the late Mark Hopkins, respectfully sheweth to the Honorable Superior Court of the State of California in and for the City and County of San Francisco, as follows:

The following allegations in the petition filed by P. B. McCanless are true and admitted:

That Mark Hopkins died in the village of Yuma in the then territory of Arizona, now State of Ari-

zona, on or about the 29th day of March, A. D. 1878 instead of 1879 as alleged in the petition.

That at the time of his death the said Mark Hopkins was a resident of San Francisco and a citizen of the State of California, and left an estate in the State of California consisting of real and personal property of great value, the exact value of which is now unknown.

Except as herein above and hereinafter admitted, the allegations and statements contained in the said petition of P. B. McCanless are untrue and denied.

Your respondent further answering specifically states:

That Mark Hopkins did not leave the will referred to in the petition of P. B. McCanless, or any other will, having died intestate.

That P. B. McCanless is not the nearest of kin of Mark Hopkins residing in the State of California, for the reason that P. B. McCanless is not related in any wise whatsoever to the late Mark Hopkins.

And it is further respectfully shown to the Court as follows:

1. That on the 19 day of August, 1925, W. P. McCanless and others addressed a petition in equity in the matter of the estate of Mark Hopkins, deceased, to the Honorable Superior Court judges of the County of San Francisco, State of California: that said petition No. 160506, was filed on the 19 day of August, 1925 in Department 9 and is now pending in said Court;



2. That each and every allegation contained in said petition is hereby re-affirmed and prayed to be considered as a part of this answer and petition, except that the said Mark Hopkins at the time of his death left four sisters instead of three sisters, their names being Annie Hopkins Russell, Prudence Hopkins Russell, Rebecca Hopkins Griffin and Elizabeth Hopkins, and a number of other relatives who, under the laws of descent and distribution of the State of California, at that time and now would be entitled to inherit the Estate of the said Mark Hopkins, deceased.

3. That your petitioners herein named are the heirs-at-law and next of kin of Mark Hopkins, deceased, who, under the laws of the State of California, are entitled to their respective distributive shares of the Estate of the late Mark Hopkins.

4. That a large portion of the property of the Estate of Mark Hopkins, deceased, has never been distributed or disposed of in such way as to prevent the proper heirs of the late Mark Hopkins from receiving said property.

5. That the alleged will filed for probate was prepared recently, many years after the death of Mark Hopkins, and is a forgery and constitutes an attempt by trick, fraud and false representations to defraud the proper heirs of the Estate of Mark Hopkins out of the property to which they are justly entitled.

Wherefore, your petitioners pray:

1. That the will herein filed be not admitted to probate:



2. That P. B. McCanless be not appointed administrator;

3. That the decree of distribution entered in this Court on the 1st day of November, 1883, be set aside and declared null and void;

4. That the Estate of the late Mark Hopkins be re-opened for a proper distribution among the rightful heirs;

5. That an administrator be appointed to ascertain and report to the Court the exact amount of property now belonging to the Estate of the late Mark Hopkins;

6. That the Court ascertain or cause to be ascertained the names and relationship of the proper and lawful heirs and distributees of the Estate of the late Mark Hopkins;

7. For an order distributing the Estate of the late Mark Hopkins to the proper parties;

8. For such other and further relief as your petitioners may be entitled to have.

JAMES H. LONGDEN,

VICTOR S. BRYANT,

Attorneys for Petitioners.

John Marshall Jones Freeman, for himself and the other petitioners, being duly sworn, deposes and says that he has read the foregoing answer and petition and that the same is true of his own knowl-

edge except as to those matters and things therein stated upon information and belief, and as to those he verily believes it to be true.

JOHN MARSHALL JONES  
FREEMAN.

Sworn to and subscribed before me this 23 day of Aug., 1926.

(Seal)                      J. W. HIATT,  
Notary Public.

My Commission Expires December 6, 1926.

[Endorsed]: Filed Aug. 28, 1926.

“EXHIBIT B”

In the Supuerior Court of the State of California,  
in and for the City and County of San Francisco.

No. 38,991—Dept. No. 9

In the Matter of the Estate of Mark Hopkins, Deceased.

ORDER DISMISSING PETITION FOR  
PROBATE OF WILL

The petition of P. B. McCandless for the probate of the document filed herein on or about the 6th day of August, 1926, as the last will and testament of Mark Hopkins, deceased, came on regularly for hearing this 16th day of December, 1926, in the above entitled court, after due and legal notice, Messrs. Hart & Rich and H. E. Witherspoon, Esq.,

appearing as attorneys for the proponent, P. B. McCandless.

Thereupon, ..... Rich, Esq., representing the said firm of Messrs. Hart & Rich, attorneys for the petitioner, made a statement in open court that he had become satisfied from his investigations that the alleged will is a forger. Thereupon H. E. Witherspoon, Esq., one of the attorneys for said proponent, made a similar statement to the court.

Upon hearing said statements, and no other statement having been made to the court, and no proof having been offered in support of said alleged will, and the court being fully advised in the premises:

It is ordered, adjudged and decreed that said document is a forgery and not the will of said Mark Hopkins, deceased; that the petition for the probate of said document be and the same is hereby denied; and it is hereby further ordered, adjudged and decreed that the said proceeding for the probate of the said alleged will be and the same is hereby dismissed with prejudice.

Done in open court this 16th day of December, 1926.

(Seal)

FRANK H. DUNNE,

Judge of the Superior Court.

[Endorsed]: Filed Dec. 16, 1926.

EXHIBIT C

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

No. 38991—Department No. 9

In Open Court, Feb. 25, 1927

In the Matter of the Estate of Mark Hopkins, Deceased.

The Clerk of the above court is hereby requested to dismiss the contest filed on behalf of certain claimants in said cause.

JAMES H. LONGDEN,  
Attorney for Contestants.

[Endorsed]: Filed Feb. 25, 1927.

EXHIBIT D

No. 38991

In the Matter of the Estate of Mark Hopkins, Deceased.

PETITION FOR LETTERS OF ADMINISTRATION  
DE BONIS NON

To the Honorable, the Superior Court of the City and County of San Francisco, State of California.

Your petitioner respectfully represents that the is a resident of the County of Guilford, State of North Carolina.

That on or about the 29th day of March, 1878,

Mark Hopkins died in the County of Yuma, The then Territory of Arizona, leaving no will.

That on the 3rd day of June, 1878, Mary Frances Sherwood Hopkins was appointed Administratrix of the above named decedent: that later said Administratrix was removed and in her place and stead, Moses Hopkins was appointed Administrator on the 10th day of December, 1881; that the said Administrator on the 1st day of November, 1883, closed the administration of said Estate, leaving a part of said estate unadministered; That the said Administrator has since died.

That the said decedent left real property of said estate unadministered, which, as your petitioner is informed and believes, amounts to a sum in excess of \$100,000,000.

That the said decedent left personal property located in this State, which, as petitioner is informed and believes, amounts to an amount exceeding the sum of \$50,000,000.

Wherefore, your petitioner prays that Letters of Administration de bonis non upon said Estate issue to your petitioner, as provided by law.

**NORMAN LEE FREEMAN,**  
Petitioner.

**JAMES HENRY LONGDEN,**  
Attorney for Petitioner.

[Endorsed]: Filed Oct. 18, 1930.



EXHIBIT E

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

No. 38991

In the Matter of the Estate of Mark Hopkins, Deceased.

ORDER OF DISMISSAL

To H. I. Mulcrevy, County Clerk:

You are herewith authorized and directed to dismiss the above entitled proceeding.

JAMES H. LONGDEN,  
Attorney for Petitioner.

Dated: October 22nd, 1930.

[Endorsed]: Filed Oct. 25, 1930.

EXHIBIT F

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

No. 38991

In the Matter of the Estate of Mark Hopkins, Deceased.

PETITION FOR DISMISSAL

And now comes James H. Longden, attorney for Petitioner, Lela Pink Martin to be appointed Ad-

ministratrix de bonis non, of the aforesaid estate and hereby requests the Clerk of said court to enter a dismissal of the Petition heretofore filed in said action.

Oakland, California, February 27, 1931.

JAMES H. LONGDEN,  
Attorney for Petitioner.

[Endorsed]: Filed Mar. 2, 1931.

### EXHIBIT G

In the Superior Court of the State of California,  
in and for the County of San Francisco.

No. 160506

In the Matter of the Estate of Mark Hopkins, Deceased. No. 8494.

### PETITION IN EQUITY

To the Honorable, the Superior Court Judges of the  
County of San Francisco, State of California:

Your petitioners W. Percy McCandless, O. Eugene McCandless, Harry McCandless, Daisy McCandless Davis, Gertrude McCandless Devlin and Eva McCandless Hinckley, all residing in the State of Washington, Zebedee V. Russell, residing in the State of Tennessee, Virden Mary Russell Johnson, Hattie Olga Russell Houston, and Augusta Leona Russell Muecke, all residing in the State of Texas, Prestly Griffin, residing in the State of Virginia, Freda Hopkins Fogleman, residing in the State of

South Carolina, Boston Hopkins, Sadie Russell Heathcock, Frederick Coggins, Charles Coggins, Ray Coggins, Pattie Coggins Cobb, Claudia Russell Russell, Mittie Coggins Cagle, Louise Harris Russell James Russell, Stella Saunders Grissom, Crissie Hopkins Cranford, Dora Saunders Hardester, Sula Russell Kopplemyer, Norman Lee Freeman, Addie Lou Freeman, Annie Blanche Freeman, Horace Lazelle Freeman, Pattie Corinne Freeman Stedman, John Marshall Jones Freeman, Patrick H. Cotton, Harris Russell, Jones M. Griffin, Charles Griffin, Victoria Griffin Stanley, Nellie Griffin Trotter, Hattie Griffin Roach, E. W. Burl Wood Griffin, Carl Griffin, Edie Griffin Russell, Sandy Y. Hopkins, Oscar Cranford, Ida Hopkins Cranford, Eugene Hill, Lizzie Cranford Vestal, Columbus Cranford, individually, and as guardian for Rayon Cranford, Elsie Cranford, Vernon Cranford, Buron Cranford, Helen Cranford, Hazel Cranford, and ..... Cranford, (name unknown), Virginia Harris Hall, known also as Jennie Harris Hall, Elijah Allen Hardester, Van Harris Hall, Harvey Coggins, Edna Hardester Morris, Margaret Harris, Glenn Harris Mullenix, Nellie Moyle Brown, Ethel Moyle, and Mary Moyle all residing in the State of North Carolina, respectfully represent unto your honors:

# I.

That the said Mark Hopkins, as the said probate proceedings show, died on or about March 29th, A.D. 1878, in the village of Yuma, County of Yuma, in the then territory of Arizona, and was at the

time of his death a resident of the City and County of San Francisco, State of California; and left an estate therein consisting of real and personal property of the aggregate value of ten millions of dollars. (\$10,000,000.)

## II.

Said probate proceedings further show that the next of kin and heirs at law of said deceased were Mary Frances Sherwood Hopkins, age 50 years, residing in the City and County of San Francisco, who petitioned the said Court and who was granted Letters of Administration of said estate on June 3, A.D. 1878; Samuel Frederick Hopkins, age 75 years, residing at St. Clair, in the State of Michigan, and Moses Hopkins, age 60 years, residing in Sutter County, State of California.

## III.

That the said Mark Hopkins, Deceased, died intestate.

## IV.

That the said Mary Frances Sherwood Hopkins, administered on said estate as Administratrix to August 26th, A.D. 1881, at which time an order was made in the Superior Court of the County of San Francisco, revoking the Letters of Administration previously issued to her and removing her as Administratrix of said estate.

## V.

That on December 10, A.D. 1881, Letters of Administration on said estate were issued to Moses Hopkins and recorded upon filing bond in the sum of \$13,000,000.

## VI.

That on the 1st day of November, A.D. 1883, a final Decree of Distribution was entered in said estate in words and figures, to-wit: "In the Superior Court of the City and County of San Francisco, State of California, Department No. 9, Probate in the matter of the estate of Mark Hopkins, Deceased; Moses Hopkins Administrator of the estate of Mark Hopkins, Deceased, having on the 16th day of March, A.D. 1883, rendered and filed here in a full account and report of his Administration of said estate. Which account was for final distribution of said estate, and said account and petition this day coming on regularly to be heard, Proof having been made to the satisfaction of the Court that the Clerk had given notice of the settlement of said account and the hearing of said petition in the manner and for the time heretofore ordered and directed by this Court. And Mrs. Mary Frances Sherwood Hopkins the only person interested in said estate except said Administrator.

Having filed her consent in writing that said account may be settled and allowed, and it appearing by the testimony of said Administrator and the vouchers by him submitted, that said account is in all respects true and correct, and that it is supported by proper vouchers, that the residue of money in the hands of the Administrator at the time of filing said account was eight hundred and ninety-five thousand and seventy-eight dollars and one cent, (\$895,078.01).

That since the rendition of said account, there



has been received by the said Administrator, the sum of eight hundred and sixteen dollars, (\$816.) that the sum of seventy two hundred and eighty-six dollars, (\$7286.) has been expended by him as necessary expenses of administration.

The vouchers whereof together with a statement of such receipts and disbursements are now presented and filed and said statement is now settled and allowed and the payments are approved by this Court. And it appearing that all claims and debts against said decedent, all taxes on said estate and all debts, expenses and charge of administration have been fully paid and discharged and that said estate is ready for distribution and in condition to be closed.

And it appearing to the Court that the said parties in interest, to-wit: Mary Frances Sherwood Hopkins, and said Moses Hopkins, have agreed in writing that the commissions and fees of said administration of said estate shall be fixed at the sum of three hundred thousand dollars: (\$300,000.) and that the same shall be apportioned as follows: To Mary Frances Sherwood Hopkins, formerly Administratrix of said estate, the sum of two hundred and twenty-five thousand dollars, (\$225,000.) and to Moses Hopkins, Administrator as aforesaid, pay the said Mary Frances Sherwood Hopkins said sum of Two hundred and twenty-five thousand dollars, (\$225,000.) as her commissions as Administratrix of said estate, and to himself the said sum of Seventy-five thousand dollars, (\$75,000.) as his com-

mission out of the moneys in his hands, whereof distribution is hereby ordered.

It is further ordered, adjudged and decreed that the said final accounts of the said Administrator be and the same are settled, allowed and approved and that the residue of said estate hereinafter particularly described and other property not known or discovered which may belong to said estator in which said estate may have any interest be and the same is hereby distributed as follows:

Three-fourths of said estate to be distributed to the widow of said deceased, Mary Frances Sherwood Hopkins, and one-fourth of said estate to be distributed to the brother of said deceased Mark Hopkins.” \* \* \* \*

“And it is further appearing to this Court, that the parties interested in said estate on the fourth day of September, A.D. 1879, to-wit: Mary Frances Sherwood Hopkins, and Samuel F. Hopkins, did on said day, enter into an agreement in writing, wherein it was agreed among other things, that upon the final settlement of said estate the court having jurisdiction thereof, shall and may by its final decree distribute the entire amount of the real estate belonging to the said estate to said Mary Frances Sherwood Hopkins.

And it further appearing to this Court, that the said Moses Hopkins, and the said Samuel F. Hopkins did on the 13th day of March, A.D. 1880, by deed duly made, executed and delivered, convey to Mary Frances Sherwood Hopkins, all their right,

title and interest, in and to all the real estate of which the said Mark Hopkins died, seized and possessed, situated, lying and being in the State of California.

It is further ordered and decreed, that the entire amount of the real estate of which the said Mark Hopkins died, seized and possessed, and in which the said estate has any right, title and interest, be and the same is hereby set aside and distributed to Mary Frances Sherwood Hopkins, and the said conveyance of the title of property from Moses and Samuel F. Hopkins, to Mary Frances Sherwood Hopkins, is hereby approved and affirmed.

Done in open Court, this first day of November, A.D. 1883.

J. V. COFFEY,  
Judge."

#### VII.

That the proceeds of the Estate of the said Mark Hopkins, were distributed in accordance with the terms of said Decree of Distribution.

#### VIII.

That during all of said time, upon information and belief, petitioners allege, that the said Mark Hopkins who died on or about March 29, A.D. 1878, left surviving him, five brothers, Moses Hopkins, James Hopkins, Martin Hopkins, John Hopkins and Joseph Hopkins, and three sisters, Annie Hopkins Russell, Prudence Hopkins Russell, and Rebecca Hopkins Griffin, all of whom resided in the State of North Carolina, and none of whom re-

ceived any part or parcel of said estate, excepting Moses Hopkins, who, resides in the State of California.

### IX.

Your petitioners respectfully allege upon information and belief, that each and every of the brothers and sisters aforesaid of the said Mark Hopkins, deceased, are dead, leaving next of kin and heir your petitioners.

### X.

That upon information and belief, your petitioners are the heirs at law, of the aforesaid Moses Hopkins, James Hopkins, Martin Hopkins, John Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell, and Rebecca Hopkins Griffin, and as such are entitled to a share in said estate.

### XI.

That during all of said time, upon information and belief, your petitioners allege that the Administrator of the Estate of the said Mark Hopkins, deceased, viz: Moses Hopkins, knew of the existence of the aforesaid brothers and sisters, and that they each and every were equally entitled to share in said estate.

### XII.

That during all of said time, upon information and belief, your petitioners allege, that by omitting the names of the co-heirs, the Administrator, Moses Hopkins, by extrinsic and collateral fraud prevented a fair submission and determination of said estate; Being guilty of wilful misrepresentation or

falsehood; thereby deceiving the Court, and preventing a just and equitable distribution of said estate.

### XIII.

That upon information and belief, your petitioners allege, that owing to said misrepresentation and deceit, in the administration of said estate of Mark Hopkins, they have a meritorious defense herein.

### XIV.

That upon information and belief, your petitioners allege, that said misrepresentation were falsely made; Were made with knowledge of their falsity; Were made with intention to deceive.

### XV.

That upon information and belief, your petitioners allege, that the notices of posting, etc., required in said estate, were constructed notices, and not of such nature as would reach beyond the confines of the State of California; That the facilities for transportation and service by mail at and during the time of the settlement of the estate of the said Mark Hopkins, were not received by the said co-heirs, namely; James Hopkins, Martin Hopkins, John Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell, and Rebecca Hopkins, Griffin, and that they had no knowledge of the death and settlement of the said estate of the aforesaid Mark Hopkins.

### XVI.

Your petitioners allege, that no information concerning the settlement of the said estate of the



aforesaid Mark Hopkins, was received by each or any of them prior to May 1st, A.D. 1923.

## XVII.

That your petitioners are without remedy in the premises except in a Court of Equity where such matters are properly adjusted,

Wherefore, They hereby petition the Honorable Superior Court, that a decree of distribution entered in said estate on November 1st, A.D. 1883, and declare the same null and void, and of no force and effect; and that said decree also provide for the opening up of said estate, and the final settlement therein, and that a trust be created for the proper and judicious handling of the said estate for the benefit and use of your petitioners, and for such they will ever pray.

JAMES H. LONGDEN,  
Attorney for Petitioners.

State of California,  
County of San Francisco—ss.

James H. Longden being first duly sworn, deposes and says:

That he is the attorney for the petitioners in the within entitled action; that he makes this affidavit for and on behalf of the petitioners for the reason that the petitioners are without the bounds of the County of San Francisco, and State of California.

That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to such matters as

are therein stated upon belief and information, and as to those matters he believes it to be true.

JAMES H. LONGDEN.

Subscribed and sworn to before me this 18th day of August, A.D. 1925.

(Seal)

HENRIETTA F. LONGDEN,

Notary Public in and for the County of Sacramento,  
State of California.

My commission expires June 22nd, 1929.

[Endorsed]: Filed Aug. 19, 1925.

“EXHIBIT H”

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

Department No. 9

No. 160506

In the Matter of the Estate of Mark Hopkins,  
Deceased.

In Open Court—Feb. 25, 1927

The clerk of above court is hereby requested to dismiss the above action from the files of said Court, without prejudice.

JAMES H. LONGDEN,  
Attorney.

[Endorsed] Filed Feb. 25, 1927.

## EXHIBIT I

Filed: July 27, 1945, H. A. Van Der Zee, Clerk.  
By J. V. Farley

In the Superior Court of the State of California  
in and for the City and County of San Francisco.

No. 100219

In the matter of the Estate of Mark Hopkins,  
Deceased.

PETITION TO VACATE AND SET ASIDE  
FINAL DECREE OF DISTRIBUTION.

To the Honorable, the above entitled Court, your  
petitioners respectfully show:

1.

That Petitioners, Alvin Chambers and Jones Griffin, appear for themselves and for all other legal heirs of the above named, deceased.

That Dr. J. W. Slate appears as the lawfully constituted Attorney in Fact to act for and on behalf of certain legal heirs of Mark Hopkins, deceased, and under and pursuant to said power of attorney is authorized to institute and prosecute suits in their behalf, and otherwise to act for them and in their stead in the premises.

2.

That Mark Hopkins died intestate on or about the 29th day of March, 1878, and was at the time of his death, and for some time prior thereto, a

resident of the County of San Francisco, State of California; that said decedent left neither father nor mother nor issue surviving him.

3.

That said decedent left property both real and personal in the State of California and in other States, that the exact amount or value of which is unknown to your petitioners.

4.

That subsequent to the death of said Mark Hopkins, one Mary Frances Sherwood, under the name of Mary Frances Sherwood-Hopkins, filed in the above entitled court her application for Letters of Administration of the estate of Mark Hopkins, deceased; that said application came on for hearing on or about the third day of June 1878, and that Letters of Administration were issued to said petitioner thereupon.

5.

That the above Honorable Court was without jurisdiction to issue said Letters of Administration in this that the hearing on said application for Letters of Administration was had without due notice having been given to the legal heirs of said decedent as required by the law governing, and more particularly as follows:

That at the time of the filing by said Mary Frances Sherwood-Hopkins of her application for Letters of Administration, said applicant well knew the names and addresses of the true and lawful heirs of said decedent; that said applicant will-

fully, knowingly, and with intent to defraud said lawful heirs, and to deceive the above Honorable Court, concealed from said court and from the Clerk thereof the names and addresses of the four (4) brothers and three (3) sisters of said Mark Hopkins: that by reason of said fraud of said applicant upon the court and said heirs, the Clerk of said court failed to mail to said heirs notice of said hearing or the time and place of said hearing, and that the said heirs received no notice thereof either directly or indirectly.

## 6.

That under and pursuant to said purported Letters of Administration to her issued by said Court, said Mary Frances Sherwood-Hopkins administered the estate of said decedent until her removal as administratrix on or about the 26th day of August, 1881, as will appear from the probate records in the office of the Clerk of said county.

## 7.

That thereafter Moses Hopkins, a Brother of Mark Hopkins, deceased, applied for Letters of Administration upon the estate of said decedent, and on or about the 10th day of December, 1881, said Court issued Letters of Administration to said Moses Hopkins.

That at the time of the filing of his said application for Letters, said Moses Hopkins well knew the names and addresses of the four brothers and three sisters of Mark Hopkins, but knowingly and willfully concealed from the Court and from the Clerk



thereof the names and addresses of said legal heirs; that by reason of said fraud of said applicant upon the Court and said heirs, the Clerk of said Court failed to mail to said heirs notice of said hearing or the time and place of said hearing, and that the said heirs received no notice thereof either directly or indirectly.

## 8.

That under and pursuant to said purported Letters of Administration, said Moses Hopkins administered said estate, and some time prior to the first day of November, 1883, applied to said Court for a decree of settlement of account and distribution of said estate. That petitioners and other legal heirs of the estate of Mark Hopkins did not receive, and none of them did receive, any notice, legal or otherwise, of said petition for settlement of account and final distribution, or of the time and place of hearing thereof.

## 9.

And petitioners further show that said purported decree of distribution of the estate of Mark Hopkins, a certified copy of which marked Exhibit "A" is annexed hereto and made a part hereof, is void upon its face, and more particularly as follows, to-wit:

That in said purported decree of distribution, the Court based its findings of fact on a contract and agreement by and between Mary Frances Sherwood-Hopkins and Moses Hopkins, and found as a fact that Mary Frances Sherwood-Hopkins was the

only person interested in said estate, except the administrator; that said court does not find it a fact, nor does it appear in said decree, that said persons are the only heirs of Mark Hopkins, said decedent; nor does it appear in said decree what interest in and to said estate of said persons, or of either of them is, as required by the law governing. And petitioners allege that the court, basing its findings of fact on a contract entered into by and between the said Mary Frances Sherwood-Hopkins and Moses Hopkins, and basing its judgment and decree upon said contract and agreement, attempted to distribute said estate pursuant thereto and without regard to the fact that Mark Hopkins died leaving surviving him four other brothers and three sisters. That said **four brothers and three** sisters were at said time living in North Carolina, and that the names of said heirs are as follows, to-wit: James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin. That all of said heirs were residents of North Carolina and lived in and around the old homestead in Randolph County where Mark and Moses Hopkins were born and spent their young manhood days.

That said purported decree of distribution attempts to distribute the entire amount of the real estate belonging to the estate of Mark Hopkins, but fails to furnish any description, legal or otherwise, of said real property. That it does not appear in said decree whether said real estate is situate in

the State of California or in any other state of the Union. That said decree contains no reference to any deed or other instrument containing a description of said real estate or any portion thereof.

That said purported decree is based upon an alleged agreement entered into by Mary Frances Sherwood-Hopkins, Moses Hopkins and Samuel F. Hopkins, and an alleged deed executed by said Moses Hopkins and said Samuel F. Hopkins and delivered to Mary Frances Sherwood-Hopkins; that said purported decree alleges by inference that the interest of said Samuel F. Hopkins in said estate had been acquired by Moses Hopkins. That in said deed referred to in said purported decree Moses Hopkins and Samuel F. Hopkins granted to Mary Frances Sherwood-Hopkins a one-eighth interest each in and to all of the real estate of Mark Hopkins. That said deed contains no description, legal or otherwise, of the real property attempted to be conveyed thereby, nor any information whether said real property is situate in the State of California or in any other State of the Union.

That said purported decree of distribution is based upon, as to the real property of the estate of Mark Hopkins, an agreement and deed, as aforesaid, to which instrument Samuel F. Hopkins is one of the signatories. That in said purported decree Samuel F. Hopkins is not named as an heir, and that his interest, if any, in said estate is not determined; that to the contrary, in said purported decree the Court advises that all claims and debts

against said decedent had been fully paid and distributed.

## 10.

And your petitioners further allege that neither the said Mary Frances Sherwood-Hopkins nor the said Moses Hopkins, at any time prior to the probate proceedings herein, notified said legal heirs or any of them of the death of their brother, Mark Hopkins, or of the administration of the estate and of the distribution thereof, but kept said facts a closed secret until years later, and after the death of some of the brothers and a sister, and that when one of the descendants learned of the death of their relative, Mark Hopkins, and wrote for information relative to the estate, he received a reply from Moses Hopkins that his brother, Mark Hopkins, had died leaving a wife and nine children.

That by reason of the wanton and wilful concealment and misrepresentation of the facts concerning the death of Mark Hopkins and the administration of the estate, the other legal heirs have been deprived and defrauded of their interest in said estate; and that by reason of the fact that the proper and legal heirship was concealed and withheld from the Court by Moses Hopkins and Mary Frances Sherwood-Hopkins, the Court was unable to determine the heirship and make an equitable and legal distribution of said estate.

## 11.

That the brothers and sisters of Mark and Moses Hopkins, who lived at the time of the death of

Mark Hopkins in North Carolina, more than three thousand miles away from the scene of the fraudulent scheme conceived and perfected by and between the said Moses Hopkins and Mary Frances Sherwood-Hopkins, knew nothing of the death of their brother, Mark Hopkins, and the administration of his estate until long after said administration and the signing of the purported decree by the Court.

12.

That the contract and agreement by and between Moses Hopkins and Mary Frances Sherwood-Hopkins, upon which said purported decree of distribution was ordered and based, was by them conceived in collusion and as a scheme wherein the said two parties might divide said estate according to their own desires, ignoring the legal heirship and the rights and interest of the heirs who owned seven-eighths of said estate, and by reason thereof said estate was not distributed according to the legal rights and interest of the collateral heirs of said Mark Hopkins.

13.

That the said Moses Hopkins, acting as administrator of the estate of Mark Hopkins, occupied a fiduciary relation towards his brothers and sisters coupled with a relationship of trust for and on behalf of his kindred, and was bound to the utmost good faith in his transactions in his legal capacity as administrator to do justice to all concerned.



## 14.

That some time after the death of Mark Hopkins, and after writing three letters to Moses Hopkins in an attempt to get information regarding his estate, a letter was received by one of said legal heirs from Moses Hopkins stating that his brother, Mark Hopkins, had died leaving a wife and nine children, as aforesaid.

That one Zebedee Russell, a relative of Mark Hopkins, had information that Mark Hopkins had died, and on receiving such information said relative wrote to Moses Hopkins requesting information as to the death of Mark Hopkins and as to his estate; that said Zebedee Russell received a reply from said Moses Hopkins that his brother, Mark Hopkins, had died and had willed all of his estate to him, the said Moses Hopkins.

That said information coming from Moses Hopkins who occupied a fiduciary relation with said heirs was by them believed; that said heirs had no occasion even to suspect that the information contained in said letter was not true as to the wife and nine children, and relied on said information and were lulled to sleep and abandoned the idea of further investigation of said estate until years later when they discovered said statements were false and made for the purpose of deceiving the heirs at law, and the heirs were thereby deceived. That upon the discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes,

fraud, and misrepresentation by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to said estate.

15.

That by reason of the fact that your petitioners and those similarly situated lived more than three thousand miles from the scene of action, and owing to the mode of travel and mail facilities back in the pioneer days of California in 1878 and immediately following, said Moses Hopkins and Mary Frances Sherwood-Hopkins were afforded ample opportunity to prosecute their deceptive and fraudulent scheme without the knowledge of said heirs.

16.

That on the 20th day of October, 1941, by petition previously filed in the Superior Court of Randolph County, State of North Carolina, and after a hearing in open court and a verdict of a jury, a decree was entered establishing the legal heirship and next of kin of the estate of Mark Hopkins, deceased; that said decree, a copy of which marked Exhibit "B," is annexed hereto and made a part hereof, sets forth the names of those proven to be entitled to Participate in the estate of the said Mark Hopkins, deceased.

17.

That your petitioners are informed and believe and upon such information and belief allege the facts to be that each and every person whose name appears in said Exhibit "C" is a legal descendant of the brothers and sisters of Mark Hopkins; that

said brothers and sisters are now dead and that the persons named in said Exhibit "C" are the next of kin and collateral heirs of the aforesaid Mark Hopkins, deceased.

18.

Your petitioners further allege that on April 5, 1879, prior to his appointment as administrator, the said Moses Hopkins, together with Mary Frances Sherwood-Hopkins and Samuel F. Hopkins, executed a deed in Sacramento, California, to Callis P. Huntington, Charles Miller, Albert Gallantier, and W. R. S. Foy, to and for a number of lots and parcels of land located in Sacramento and San Francisco, California, stating in the body of said deed that they were the wife and brothers of Mark Hopkins and constituted the only heirs of the deceased; that said statements were false and fraudulent; that said Samuel Hopkins was not an heir or the son of an heir of Mark Hopkins.

19.

That on March 13, 1880, the said Moses and Samuel Hopkins executed a deed to Mary Frances Sherwood-Hopkins conveying to her a one-eighth interest each of all their right, title, and interest in and to all the real estate owned by Mark Hopkins, deceased. That said deed was executed prior to the appointment of Moses Hopkins as administrator of said estate. That at the time of the execution of said deed, said Mary Frances Sherwood-Hopkins was acting as administratrix of said estate under the purported Letters of Administration thereto-

fore issued by said court; that by virtue of said Letters of Administration said Mary Frances Sherwood-Hopkins occupied a fiduciary relation and a position of trust as between herself and the legal heirs of Mark Hopkins, deceased. That Samuel Hopkins, one of the purported grantors named in said deed, had no interest in said estate and was not an heir of Mark Hopkins.

## 20.

Your petitioners further allege on information and belief that the said Moses Hopkins, acting as administrator and in his individual capacity, well knew the whereabouts of all the existing property and assets belonging to said estate of the late Mark Hopkins; and that, prior to his death, the said Moses Hopkins fraudulently permitted same to be concealed and hidden in order to deprive the next of kin and heirs of Mark Hopkins from the benefits of distribution thereof, thereby perpetrating a fraud upon the Court and the legal heirs.

## 21.

That your petitioners further allege on information and belief that the said Mary Frances Sherwood-Hopkins was never legally married to the late Mark Hopkins and was not his wife; but as your petitioners are informed, believe and allege on information and belief, was the housekeeper in the home of Mark Hopkins and knew of the relationship of Mark Hopkins and his kindred in North Carolina. That in order to perpetrate a scheme to defraud the legal heirs of Mark Hopkins, to-wit,



brothers and sisters in North Carolina, Moses Hopkins entered into a scheme and an agreement with the said Mary Frances Sherwood-Hopkins to the effect that if she would aid and abet him in his unlawful scheme he would give her three-fourths of said estate. That Mary Frances Sherwood-Hopkins did aid and abet Moses Hopkins in said fraudulent scheme and entered into the said unlawful agreement upon which the decree of distribution of the Court was based, as aforesaid, to be misleading and deceiving the Court as to the facts relative to the heirship and rights of the heirs of Mark Hopkins; that by reason of the said acts of Moses Hopkins and Mary Frances Sherwood-Hopkins, a fraud was practiced upon the Court and upon petitioners.

## 22.

That at the time the said Moses Hopkins applied for Letters of Administration and during his tenure as administrator, and at the time he made application for distribution and when the Court signed the decree making the distribution of the property and assets of said estate, and at the time of the execution of the deed to Callis P. Huntington, et al, stating that Mary Frances Sherwood-Hopkins was the wife of Mark Hopkins and that they were the only heirs of Mark Hopkins, Moses Hopkins knew of his own knowledge of the four brothers and three sisters and knew that they lived in Randolph County, North Carolina, and purposely concealed said facts with the intention and



purpose of deceiving the Court and defrauding the legal heirs of their rights and interests in said estate, and did deceive the Court and defraud said heirs of their interest in said estate, as aforesaid.

## 23.

That the fraudulent acts of Mary Frances Sherwood-Hopkins in representing herself to be the wife of the late Mark Hopkins were not discovered by your petitioners until 1943 and 1944 when your petitioners discovered the records showing that she was only the housekeeper in the home of the said Mark Hopkins.

## 24.

That the fraudulent acts of Moses Hopkins in representing that they were the only heirs of Mark Hopkins, as set forth herein, were not discovered until 1944.

## 25.

That your petitioners have used due diligence in seeking to have determined and to enforce their rights as heirs to said estate, and more particularly as follows, to-wit:

That in 1925, or thereabouts, your petitioners were informed that they had an interest in the estate of their relative, Mark Hopkins, of California, consisting of real and personal property, the exact amount and location of which were unknown to your petitioners. That thereupon said petitioners employed representatives and counsel and contributed funds for the purpose of locating and determining the estate of Mark Hopkins, and of in-

vestigating and enforcing their legal rights thereto. That they were informed from time to time by their said counsel that all available legal steps were being taken, and that it was only a matter of time until their legal rights would be judicially determined and the said estate would be closed. That said heir claimants believed and relied upon their said counsel and representatives and continued so to believe until 1943, or thereabouts; that at said time plaintiffs, having lost confidence in the said representation referred to above, employed other counsel to investigate and to advise as to what had been done and what could be done in the matter of their legal rights as heir claimants to the estate of said decedent. That upon such investigation it was discovered that no proper legal steps had been taken towards the recovery of said estate, and that in fact certain actions had been commenced in the above entitled court to that end and without the knowledge or consent of petitioners or any other heir claimant had been withdrawn.

## 26.

That the decree of distribution of the estate of Mark Hopkins given, made, and entered by the Court on the first day of November, 1883, is void upon its face for the reasons set forth in paragraph 9 herein.

## 27.

That said decree of distribution given, made, and entered by the Court on the first day of November, 1883, is void for the reason that the Court was

without jurisdiction of the subject matter of the decree and of the estate of Mark Hopkins by reason of the failure to give the legal notices upon the application for Letters of Administration on the part of Mary Frances Sherwood-Hopkins, and later on the part of Moses Hopkins, as hereinbefore set forth.

## 28.

That the fraudulent acts and schemes of Moses Hopkins and Mary Frances Sherwood-Hopkins, as heretofore alleged, were by them conceived, perpetrated, and executed with the intent and purpose to deceive, and were calculated to deceive and did deceive the Honorable Court and to defraud and deprive your petitioners, heirs of Mark Hopkins, of their interest in and to said estate.

## 29.

That Alvin Chambers, one of the petitioners herein, is a direct descendant of Joseph Hopkins, who was an elder brother of Mark and Moses Hopkins; that Jones Griffin, one of the petitioners herein, is a direct descendant of Rebecca Hopkins Griffin, who was a sister of Mark and Moses Hopkins.

## 30.

That the motion of petitioners herein will be made upon the grounds that the court was without jurisdiction to grant Letters of Administration upon and a decree of distribution of the estate of Mark Hopkins, and that said purported decree of distribution is void upon its face, and that said decree was obtained by fraud practiced upon the

Court and upon the heirs of Mark Hopkins; and will be based upon the foregoing petition which is offered hereby as an affidavit, and upon affidavits annexed hereto and made a part hereof, and upon such additional affidavits and documentary evidence as may be adduced at the hearing.

Wherefore, petitioners respectfully pray:

(1) For an order of the Court, after proceedings duly had to that end, vacating and setting aside the decree of distribution heretofore given, made, and entered in the matter of the estate of Mark Hopkins, deceased.

(2) For an order, after proceedings duly had to that end, that Letters of Administration issue to an administrator of the estate of Mark Hopkins.

(3) And for further relief as the Court may deem meet and equitable in the premises.

/s/ ALVIN CHAMBERS,  
One of the petitioners.

/s/ CHARLES H. SECCOMBE,  
Attorneys for Petitioners.

State of North Carolina,  
County of Durham—ss.

Alvin Chambers, being first duly sworn deposes and says:

That he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof and that the same is true, ex-

cept only as to the matters herein stated upon information and belief and that as to those matters he believes it to be true.

ALVIN CHAMBERS.

Subscribed and sworn to before me this 23 day of June, 1945.

(Seal)

T. J. HORTON,

Notary Public.

My Commission expires July 26, 1946.

State of North Carolina,

County of Durham—ss.

I, A. J. Gresham, deputy Clerk of the Superior Court of Durham County, North Carolina, the same being a Court of Record, having an official seal, do hereby certify that T. J. Horton whose name is subscribed to the certificate of the proof, acknowledgment, or affidavit of the annexed instrument in writing, was, at the time of taking such proof, acknowledgment, or affidavit, a Notary Public in and for said County, duly commissioned and sworn and authorized to take and certify the same; and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of North Carolina; and further that I am well acquainted with the handwriting of Notary Public and verily believe the signature to the certificate of proof, acknowledgment, or affidavit is genuine.



I do further certify that the law of this State requires a Notary Public to have a seal, and that the seal of T. J. Horton hereto affixed is the seal of such Notary as required by the laws of this State.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Superior Court, at office in Durham, North Carolina, this the 25th day of June, 1945.

A. J. GRESHAM,  
Deputy Clerk Superior Court.

#### EXHIBIT A

In the Superior Court of the City and County of  
San Francisco, State of California.

#### Department No. 9—Probate

In the Matter of the Estate of Mark Hopkins,  
Deceased.

Moses Hopkins, Administrator of the Estate of Mark Hopkins, deceased having on the sixteenth day of March A. D. 1883, rendered and filed herein a full account and report of his administration of said Estate, which account was for a final settlement, and having with said account filed a petition for the final distribution of the Estate. And said account and petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court that the Clerk had given notice of the settlement of said account and the hearing

of said petition in the manner and for the time heretofore ordered and directed by this Court. And Mrs. Mary Frances Sherwood-Hopkins the only person interested in said Estate, except said Administrator, having filed her consent in writing, that said account may be settled and allowed. And it appearing by the testimony of said Administrator and the vouchers by him submitted that said account is in all respects true and correct and that it is supported by proper vouchers; that the residue of money in the hands of the Administrator at the time of filing said account, was Eight hundred and ninety-five thousand and seventy-eight dollars and one cent, (\$895,078.01); that since the rendition of said account there has been received by the said Administrator the sum of Eight hundred and sixteen dollars (\$816) that the sum of Seventy-two hundred and eighty-six dollars has been expended by him as necessary expenses of administration, the vouchers whereof together with a statement of such receipts and disbursements are now presented and filed and said statement is now settled and allowed and the payments are approved, by this Court; and it appearing that all claims and debts against said decedent all taxes on said estate, and all debts, expenses and charges of administration have been fully paid and discharged and that said estate is ready for distribution and in condition to be closed. And it appearing to the Court that the said parties in interest, to-wit: Mary Frances Sherwood Hopkins and said Moses Hopkins, have

agreed in writing that the commissions and fees of administration of said estate shall be fixed at the sum of Three thousand dollars; and that the same shall be apportioned as follows to Mary Frances Sherwood Hopkins, formerly Administratrix of said Estate, the sum of Two hundred twenty-five thousand dollars (\$225,000) and to Moses Hopkins the sum of Seventy-five thousand dollars (\$75,000), and that the said Moses Hopkins, Administrator as aforesaid pay the said Mary Frances Sherwood Hopkins said sum of Two hundred and twenty-five thousand dollars (\$225,000) as her commissions as administratrix of said Estate and to himself the said sum of Seventy-five thousand dollars (\$75,000) as his commissions out of the moneys in his hands whereof distribution is hereby ordered. It is further ordered, adjudged and decreed that said final accounts of the said Administrator be and the same are settled, allowed and approved and that the residue of said Estate hereinafter particularly described and any other property not now known or discovered which may belong to said Estate, or in which the said Estate may have any interest, be and the same is hereby distributed as follows. Three-fourths of said Estate to be distributed to the widow of said deceased, Mary-Frances Sherwood Hopkins, and one-fourth of said Estate to be distributed to the brother of said deceased, Moses Hopkins. The following is a particular description of said residue of said Estate referred to in this decree and of which distribution is now ordered as aforesaid. \$895,078.01 in gold coin of the United

States, cash in the hands of said Administrator. 586 $\frac{1}{4}$  Shares of the Capital Stock of the Copperopolis Railroad Company, 350 Shares of the Capital Stock of the Los Angeles and San Diego Railroad Company, 750 Shares of the Capital Stock of the Potrero and Bay View Railroad Company, 10,000 Shares of the Capital Stock of the Occidental and Oriental Steamship Company, 750 Shares of the Capital Stock of the California Pacific Railroad Company, 102 Shares of the Capital Stock of the Rocky Mountain Coal and Iron Company, 1388  $\frac{8}{9}$  Shares of the Western Development Company,  $\frac{1}{4}$  of 393 Bonds of the Sacramento Valley Railroad Company, 1 Share of the Capital Stock of the Orleans Hill Vinticultural Association. And it further appearing to this Court that the parties interested in said Estate on the fourth day of September A. D. 1879, to-wit: Mary Frances Sherwood Hopkins, Moses Hopkins and Samuel F. Hopkins, whose interest in said Estate has since been acquired by Moses Hopkins, did on said day enter into an agreement in writing wherein it was agreed, among other things, that upon the final settlement of said Estate, the Court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said Estate to said Mary Frances Sherwood Hopkins. And it further appearing to this Court that the said Moses Hopkins and the said Samuel F. Hopkins, did, on the thirteenth day of March, A. D. 1880 by deed duly made, executed and delivered convey to Mary Frances Sherwood Hopkins, all their right, title,



and interest in and to all the real estate of which the said Mark Hopkins died seized and possessed, situated, lying and being within the State of California. It is further ordered, adjudged and decreed that the entire amount of the real estate of which the said Mark Hopkins died seized and possessed and in which the said Estate has any right, title or interest be and the same hereby is set aside and distributed to Mary Frances Sherwood Hopkins, widow of said deceased, and the said conveyance from Moses Hopkins and Samuel F. Hopkins to Mary Frances Sherwood Hopkins is hereby approved and confirmed. Done in open Court this first day of November A. D. 1883.

J. V. COFFEY, Judge.

Statement of Receipts and Disbursements since the filing of the Final Accounty of the Administrator. Receipts

March 15—Rocky Mountain Coal & Iron Co. Div. 130	\$102
April 15—Rocky Mountain Coal & Iron Co. Div. 131	102
May 15—Rocky Mountain Coal & Iron Co. Div. 132	102
June 15—Rocky Mountain Coal & Iron Co. Div. 133	102
July 15—Rocky Mountain Coal & Iron Co. Div. 134	102
Aug. 15—Rocky Mountain Coal & Iron Co. Div. 135	102
Sept. 15—Rocky Mountain Coal & Iron Co. Div. 136	102
Oct. 15—Rocky Mountain Coal & Iron Co. Div. 137	102

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\$816

1883	Disbursements	
May 3—Fees recording deed	15.	\$ 5
May 19—Clerk's fees	16.	15
June 29—E. B. Ryan Salary as agent	17.	1,500
Aug. 3—Personal property taxes C & C.	18.	5,736
Nov. 1—Expenses of closing administration	19.	30

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\$7,286

[Endorsed]: Filed Nov. 12, 1883 William T. Jesnon,  
Clerk. By J. C. Hamilton, Deputy Clerk; W. H.  
L. Barnes, Attorney for Administrator.



**Office of the County Clerk of the  
City and County of San Francisco—ss.**

I, William T. Jesnon, County Clerk of the City and County of San Francisco and ex-officio clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true and correct copy of the Decree of Distribution in the Estate of Mark Hopkins, deceased, now on file and of record in my office. Witness my hand and the seal of said Court this 15th day of February A. D. 1884.

WILLIAM T. JESNON,  
Clerk.

(Seal) By E. J. CASEY,  
Deputy Clerk.

Recorded at Request of Wells Fargo & Co., Feb. 20, 1884, at 45 Mins. past 11 A. M. Recorded in Book 36 of Deeds page 9 Records of Napa Co. Cal. N. L. Neilsen County Recorder. By Henry Brown Deputy.

Recorded at the request of Wells Fargo & Co. March 13th, A. D. 1884 at 55 minutes past 8 o'clock A. M. in Liber 88 of Deeds page 133 Records of Solano County, Cal. F. P. Weinmann County Recorder. By F. Wm. Gabriel Deputy Recorder.

Recorded at request of Wells Fargo & Co. March 27, 1884 at 35 minutes past 9 A. M. in Liber 36 of Deeds page 405 Yolo Co. Records. R. F. Hester Recorder.

Recorded at request of Wells Fargo & Co. April 7th, 1884 at 11:45 A. M. in Book 112 of Deeds, page 537 Sacramento County Records. W. E. Gerber Recorder. By C. E. Burnham Deputy.

Recorded at Request of Wells Fargo & Co. May 5th, A. D. 1884 at 40 minutes past 10 o'clock A. M. in Liber No. 32 of Deeds page 586 et seq Yuba County Records. S. O. Gunning Recorder.

Filed and recorded at the request of Wells Fargo & Co. May 15th, 1884 at 45 minutes past 3 o'clock P. M. in Book "R" of Deeds, page 118 Records of the County of Sutter. W. H. Lee County Recorder. By C. R. Wilcoxon Deputy Recorder.

State of California,  
County of Sutter—ss.

I, E. M. Boyd, County Recorder of the County of Sutter, State of California, do hereby certify that I have compared the foregoing copy of Estate of Mark Hopkins, Deceased, with the original records of the same remaining in this office, and that the same are correct transcripts thereof, and of the whole of said original records.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office, in the County of Sutter, this 30th day of June, 1932.

(Seal)

E. M. BOYD,

1772

County Recorder.

EXHIBIT B

In the Superior Court.

(Minute Docket 15 page 375)

North Carolina,  
Randolph County—ss.

SANDY YOUNG HOPKINS, LAURA HOPKINS KIRK, NORMAN LEE FREEMAN and  
BLANCHE FREEMAN, et al,

vs.

W. L. HILL.

JUDGMENT

This cause coming on to be heard at October Term 1931 of the Superior Court of Randolph County before His Honor, N. A. Sinclair, Judge, and a jury, and the jury having answered the issues submitted to them as follows:

1. Were James Hopkins, John Hopkins, Joseph Hopkins, Martin Hopkins, Elizabeth Hopkins, Prudence Hopkins, Annie Hopkins, Mark Hopkins, Moses Hopkins and Rebecca Hopkins and children, heirs-at-law and next of kin of Edward Hopkins and Hannah Crow Hopkins of Crow Creek, New Hope Township, Randolph County, North Carolina?

Answer: Yes.

2. If so, was Mark Hopkins son of Edward and Hannah Crow Hopkins, the same person who went to California and became Treasurer of the Central Pacific Railroad and an organizer of the Ione Coal and Iron Company?

Answer: Yes.

3. Are the plaintiffs in this action the heirs-at-law and next of kin of the said Edward Hopkins, Hannah Crow Hopkins, Mark and Moses Hopkins?

Answer: Yes.

4. Are the plaintiffs the owners of the land described in the complaint?

Answer: No.

It is therefore considered and adjudged that the plaintiffs are the sole heirs-at-law of Edward Hopkins and Hannah Crow Hopkins, and of Mark Hopkins and Moses Hopkins, but that the plaintiffs are not the owners of the land described in the complaint, the same belonging to the defendant, W. L. Hill;

It is further adjudged that the plaintiffs pay the cost of the action, to be taxed by the Clerk.

(Seal)

N. A. SINCLAIR,

Judge Presiding.

## EXHIBIT C

### LIST OF HEIRS

Ella Moore Haggard, 214 Duke Drive, Portsmouth, Va.

Florence Crawford, Eldorado, N. C.

Chas. H. Crawford, Eldorado, N. C.

Mrs. Thos. Lee Cotton, Ganzoler, Texas.

H. F. Robinson, High Point, N. C.

Mary Hopkins Burnes, Ashboro, N. C.

Edna Hardison Morris, Eldorado, N. C.

Suda Russell Coffey, Jackson Creek, N. C.

R. W. Slate, High Point, N. C.  
Lulla Hopkins Smith, Denton, N. C.  
Jennie Hall, Thomasville, N. C.  
Vanger L. Walters, Durham, N. C.  
Mrs. W. Vance Williams, Albermarl, N. C.  
Mrs. J. R. Hill, Troy, N. C.  
Sadie B. Haithecock, Washington, D. C.  
George L. Haithecock, Washington, D. C.  
W. E. Burgess, Durham, N. C.  
Mrs. W. E. Burgess, Durham, N. C.  
Susan M. Brown, Durham, N. C.  
C. M. Bishop Parker, Portsmouth, Va.  
Mrs. Carl Griffin, High Point, N. C.  
Eula Drissom Luthes, Eleozer, N. C.  
H. T. Grissom, Eleozer, N. C.  
Jones M. Griffin, High Point, N. C.  
Annie Griffin Henderson, Denton, N. C.  
J. M. Griffin, High Point, N. C.  
F. K. Grissom, Troy, N. C.  
Mary Ethel B. Stephens, Raleigh, N. C.  
Etture S. Thompson, Durham, N. C.  
Lillie Harris Cashalt, Bodie, N. C.  
Oscar A. Griffin, Thomasville, N. C.  
N. E. Chandler, Thomasville, N. C.  
R. A. Henderson, Saxapahaw, N. C.  
Mrs. W. E. Moore, Raleigh, N. C.  
Wake C. Moore, Raleigh, N. C.  
Mrs. George Moore White, Raleigh, N. C.  
Mrs. Thos. Moore Graham, Raleigh, N. C.  
William D. Moore, Raleigh, N. C.  
Clyde Moore Perry, Raleigh, N. C.  
Ella Moore, Raleigh, N. C.



Eva Moore, Raleigh, N. C.  
Claud Moore, Raleigh, N. C.  
Charley Moore, Raleigh, N. C.  
S. T. Dorthy, Durham, N. C.  
Lucy Dorthy, Durham, N. C.  
Sophia J. Davis, High Point, N. C.  
Walter Chambers, Bahama, N. C.  
A. E. Chandler, Eldorado, N. C.  
Alvin L. Chambers, Durham, N. C.  
Mrs. Bulah Elam, Candor, N. C.  
Mrs. Carl Holt, Albermarle, N. C.  
Mrs. John F. Hill, Bodie, N. C.  
Euleva Davis Hicks, High Point, N. C.  
Mrs. Irvan Holcomb, Hamptonville, N. C.  
Mrs. Melgum Hicks, Roxboro, N. C.  
Mrs. Alma Hopkins, Eldorado, N. C.  
Mrs. Willie Moore Stephens, Raleigh, N. C.  
Mary Louise Moore, Raleigh, N. C.  
Edhar Moore, Raleigh, N. C.  
John T. Moore, Raleigh, N. C.  
Meligum Hicks, Roxboro, N. C.  
Jimmey Hopkins, Aldorado, N. C.  
Sandy Hopkins, Thomasville, N. C.  
Benson Hardister, Bodie, N. C.  
Mrs. Clarence Averett, Raleigh, N. C.  
Otho W. Bolling, Durham, N. C.  
Victor B. Bolling, Durham, N. C.  
Nellie Balcum, High Point, N. C.  
Victoria Griffin Stanley, High Point, N. C.  
Mrs. V. E. Hayworth, High Point, N. C.  
Oscar S. Griffin, High Point, N. C.  
Mrs. Eva Moore Cash, Richmond, Va.

Winnie Davis, High Point, N. C.  
Gary Davis, High Point, N. C.  
Hal Hicks, High Point, N. C.  
G. Max Harris, Winston Salem, N. C.  
Rodney E. Roach, Lexington, N. C.  
G. O. Pendergraph, Waynesboro, Va.  
Myrtle C. Deere, Albermarle, N. C.  
Lizzie I. Nash, Albermarle, N. C.  
Coza Chandler, Albermarle, N. C.  
Grady Chandler, Albermarle, N. C.  
Brad Chandler, Albermarle, N. C.  
Reese Chandler, Albermarle, N. C.  
B. E. Chandler, Albermarle, N. C.  
Sandy Chandler, Albermarle, N. C.  
B. A. Chandler, Albermarle, N. C.  
Chas. Preston Griffin, Fayetteville, N. C.  
Mrs. Henry McKee Miller, Rougemout, N. C.  
Glenn Harris Mullinax, Eldorado, N. C.  
Edward Dennie Chambers, Durham, N. C.  
Walter Knott, Mooresville, N. C.  
Dewey Rouch Knott, Mooresville, N. C.  
Mrs. Claude W. Fulk, Winston Salem, N. C.  
Nellie Griffin Futrell, High Point, N. C.  
S. E. Futrell, High Point, N. C.  
Lozella Freeman Page, Martinsville, Va.  
Mrs. Iphigemia Freeman, Martinsville, Va.  
Bulah Elam Walker, Candor, N. C.  
W. R. Smith, Statesville, N. C.  
Verlie Griffin Boxley, High Point, N. C.  
Cassie Hopkins Crawford, Eldorado, N. C.  
Zebb V. Russell, Dyer, Tenn.  
H. L. Grissom, Eldorado, N. C.

Paul A. Cecil, High Point, N. C.  
 Guilford E. Griffin, High Point, N. C.  
 Lillian Griffin Davis, Thomasville, N. C.  
 Annie Griffin Henderson, Denton, N. C.  
 Mrs. Mary Griffin, High Point, N. C.  
 Pauline Robbins, High Point, N. C.  
 Harry S. Griffin, High Point, N. C.  
 Norman Griffin, High Point, N. C.  
 Mrs. E. P. Walters, Timberlake, N. C.  
 L. T. Walters, Wake Forst, N. C.  
 Elisha L. Chandler, High Point, N. C.  
 Clide Russell, Eldorado, N. C.  
 Sula Grissom Hill, Troy, N. C.  
 Pattie Hardiston McKinney, Bodin, N. C.  
 Millie Coggins Cagle, Eldorado, N. C.  
 Roy Coggins, Troy, N. C.  
 Paul D. Pendergraph, Chappel Hill, N. C.  
 Lizzie Hunt Rhew, Durham, N. C.  
 N. Y. Rhew, Roufemount, N. C.  
 Pauline Russell Overcash, Salesbury, N. C.  
 H. L. Russell, Salesbury, N. C.  
 Fred Oliver Roach, High Point, N. C.  
 H. M. Roach, High Point, N. C.  
 Edith Roach, High Point, N. C.  
 Mrs. Brice Russel, Salesbury, N. C.  
 Moses H. Russell, Washington, D. C.  
 Stella Russell, Washington, D. C.  
 Asa Rhew, Roufermont.  
 Annie Rhew, Roufermont.  
 Mary W. Pendergraph, Durham, N. C.  
 G. E. Peler, High Point, N. C.  
 Maggie Robinson, Durham, N. C.

Mrs. C. L. Daniels, Durham, N. C.  
Mrs. J. B. Walters, Durham, N. C.  
Mrs. Etura Thompson, Durham, N. C.  
Miss Vanger Walters, Durham, N. C.  
S. F. Dorthy, Durham, N. C.  
Lucy Ball Dorthy, Durham, N. C.  
W. E. Latta, Durham, N. C.  
Mable Howell Brice, Durham, N. C.  
James E. Howell, Durham, N. C.  
Eunice Latta Overton, Oxford, N. C.  
Viola Latta Floyd, Kittrill, N. C.  
Emma Howell Latta, Durham, N. C.  
Susan Brown, Durham, N. C.  
Lizzie Hunt Rnew, Durham, N. C.  
Ruby G. Carey, Washington, D. C.  
Melba Cathra Tilley, Durham, N. C.  
William S. Tilley, Durham, N. C.  
Mrs. W. A. Chambers, Rougemont, N. C.  
Ida Yates, High Point, N. C.  
Dr. W. A. Lackey, High Point, N. C.  
J. A. Chambers, Timberlake, N. C.  
M. G. Chambers, Rougemont, N. C.  
L. C. Chambers, Roxboro, N. C.  
Sterling F. Chambers, Timberlake, N. C.  
W. C. Chambers, Timberlake, N. C.  
Dr. P. J. Chester, Southern Pines, N. C.  
Sallie Lee Coggins Cobb, New London, N. C.  
Roy H. Davis, Greensboro, N. C.  
Mrs. G. L. Haithecock, Washington, D. C.  
Florence Cranford, Eldorado, N. C.  
Fate Grissom, Troy, N. C.  
Hellen McLawrinblackwelder, Richmond, Va.

Charlie Hertford Moor, Raleigh, N. C.

Mrs. L. L. Lefler, Concordia, N. C.

Julian B. Davis, Baltimore, Maryland.

Mrs. W. Vance Williams, Albermarle, N. C.

Chas. B. Kearns, Troy, N. C.

Rue Kearns Holton, Thomasville, N. C.

Vernon A. Kearns, High Point, N. C.

Nina Kearns Cole, Troy, N. C.

Patric Henry Cotten, Rocky Mount, N. C.

M. N. Dry, High Point, N. C.

Estelle Latta, Durham, N. C.

#### EXHIBIT J

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

Department No. 9 Probate

Court met: present Hon. T. I. Fitzpatrick Judge,  
and officers of the court.

No. 100219

In the Matter of the Estate of Mark Hopkins, Deceased.

#### MINUTE ORDER

Motion to dismiss Wells Fargo Bank and Union  
Trust Company, Motion Denied.

Heretofore submitted

Motion to dismiss proceedings for lack of jurisdiction, Granted.

June 10, 1946.

FRED W. MACK,  
Deputy County Clerk.



## EXHIBIT K

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

Dept. 9. No. 100219

In the Matter of the Estate of Mark Hopkins, Deceased.

ORDER FOR WITHDRAWAL OF CERTAIN  
AFFIDAVITS

Upon motion of Charles H. Seccombe and S. J. Bennett of counsel of record for petitioners herein, and it appearing that the affidavits hereinafter referred to on file in the office of the County Clerk have not been received in evidence as exhibits nor are they a part of the record herein, and good cause therefore appearing.

It is hereby ordered, that said petitioners may and they are hereby permitted to withdraw from said files in the County clerk's office said affidavits and to substitute therefor true copies of said affidavits.

The affidavits referred to above are those of the following named persons, to wit:

Jones M. Griffin X	William G. Gibson X
Carl Griffin X	J. C. Kelly
Jones M. Griffin X	Jessie Shaw X
Della Saunders Russell X	J. H. Hearn X
Christain Bringle X	

J. Ellwood Cox X	D. N. Milton X
W. R. Jenkins X	Della Russell X
Alexander Harris X	Elmira Brookshire
Nathaniel Hall X	Jarrell X
Sula Russell Koppel-	M. C. Elam X
myer X	Marshall Jones Free-
Sula Russell Koppelmyer	man X
W. L. Cranford X	CO.. D. H. Milton X
Dora Koppelmyer	J. O. Chambers X
Cranford X	
Laura Koppelmyer	Alvin Chambers X
Ridge X	
Lucy Hunt Doherty X	Mrs. F. L. Latta
Susan Braum X	Alvin Chambers X

Dated this 13 day of January, 1947.

T. I. FITZPATRICK,  
Judge of the Superior Court.

Received following above checked affidavits Jan.  
13, 1947.

S. J. BENNETT.

No. 100219

North Carolina,  
Durham County

In the Matter of the Estate of Mark Hopkins

### AFFIDAVIT

Alvin L. Chambers, after being duly sworn, de-  
poses and says:

That he is the Son of the late, William James

Chambers. That about the year of 1889 your affiant was living in the home of his Father, and one Elizabeth Chambers, a Cousin of Father, came to our home and stated that she had learned that their relative Mark Hopkins, had died in California, and left an estate.

She (Elizabeth Chambers) insisted that my Father go to California and investigate the matter, for she understood that he (Mark Hopkins) was not married. This was in the summer, and my Father stated that as soon as he gathered his tobacco crop and made a sale, he would go. Thereafter, Father, wrote as many as three letters to Moses Hopkins (Brother of Mark Hopkins) making inquiry as to the death of his relative, Mark Hopkins. He at the same time made investigations of transportation to California and return. That just prior to the time he expected to leave for California he received a letter from Moses Hopkins, your affiant then a small boy met the mail man at the gate and got the letter and carried it to his Father, who was standing in the yard of their home. My Father read the letter to me and among other things the letter stated that, Brother Mark, had died some years before and left a wife and nine children, my Father stated, that if he (Mark Hopkins) had died and left a wife and nine children, it would take all he had to care for and educate his wife and children, and he would not bother about the estate any further.

I (your affiant) have also heard my Father speak

of Mark and Moses Hopkins, being in California,  
**often-times.**

This the 7th day of February, 1946.

/s/ ALVIN L. CHAMBERS,  
Affiant.

Sworn and subscribed to before me this 7th day  
of February, 1946.

(Seal)                      O. A. JOHNSON,  
Notary Public.

My Commission expires 6/7/47.

State of North Carolina,  
County of Durham—ss.

I, A. J. Gresham, deputy Clerk of the Superior Court of Durham County, North Carolina, the same being a court of Record, having an official seal, do hereby certify that O. A. Johnson, whose name is subscribed to the certificate of the proof, a Notary Public in and for said County, duly commissioned and sworn and authorized to take and certify the same; and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments, in said State of North Carolina; and further that I am well acquainted with the handwriting of Notary Public and verily believe the signature to the certificate of proof, acknowledgment, or affidavit is genuine.

I do further certify that the law of this State requires a Notary Public to have a seal, and that

the seal of O. A. Johnson hereto affixed is the seal of such Notary as required by the laws of this State.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Superior Court, at office in Durham, North Carolina, this 7th day of February, 1946.

(Seal)            /s/ A. J. GRESHAM,  
Deputy Clerk Superior Court.

No. 100219

North Carolina,  
Durham County—ss.

In the Matter of the Estate of Mark Hopkins.

### AFFIDAVIT

Estelle Cothran Latta, after being duly sworn, deposes and says; that she was born in Person County, N. C. December 15th, 1903, and is now 43 years of age, and resides in Durham, North Carolina.

That she is a double relative of Mark Hopkins.

That she is the daughter of William Anderson Cothran, who was the Son of Haywood Cothran; Haywood Cothran, was the son of Susannah Hopkins Cothran; Susannah Hopkins Cothran, was a daughter of James Hopkins, the said James Hopkins was a Brother of Mark Hopkins.

That she (this affiant) is the daughter of Susan Ann Vaughn Cothran, (her Mother, Mrs. William Anderson Cothran); that Susan Ann Cothran, was



the daughter of Margaret Ellen Chambers; that Margaret Ellen Chambers, was the daughter of Nancy Hopkins Chambers; that Nancy Hopkins Chambers, was a daughter of Martin Hopkins; that the said Martin Hopkins, was a Brother of Mark Hopkins and the son of Edward Hopkins and Hannah C. Hopkins.

This affiant well remembers her Father and Mother discuss Mark Hopkins and Mose Hopkins, and the existing conditions under which they left North Carolina. Mose Hopkins had stolen a horse and had deserted his wife and was indicted in the North Carolina Courts (see copies filed in the cause). Mose Hopkins never came back to North Carolina to visit his relatives, but Mark Hopkins did come back on a brief visit twice in the years of 1865 and 1877. It was generally understood in my family that Mark Hopkins was a single man and had accumulated a lot of property, and was in the Railroad business in California, and a wealthy man.

Some years later, around 1886 or 1887, the Father of this Affiant heard through a salesman that Mark Hopkins was dead. He immediately wrote to California and asked if it were true that he (Mark Hopkins) was dead, and if it were true why his immediate family at home in North Carolina were not notified of his death, and also inquired of their rights (his Mother, Father and Brother and Sisters) to participate in the settlement of his estate. Someone answered this letter, presumably Mose Hopkins, and stated in the letter that Mark Hop-

**kings died and left** surviving him a wife and children who inherited his estate.

This affiants Father and Mother decided that in that case they would not be entitled to inherit any portion of the estate and therefore dropped it.

Nothing else was heard from Moses Hopkins or his Brother Mark Hopkins estate until around 1925. Some man who was visiting in North Carolina from California told us that Moses Hopkins and a woman by the name of Mary Francis Sherwood Hopkins inherited Mark Hopkins estate, but that Mark Hopkins was never married. My Father (the father of this affiant) immediately called a meeting of the heirs and employed Counsel to represent them. However, we the Heirs, were misinformed about the status of the case until 1944 when we employed other Counsel to go to California and investigate the whole matter of the estate of Mark Hopkins. Upon said investigation we found that no legal proceedings had been pursued. That only two petitions had been filed in the Superior Court of San Francisco, California, and these were immediately withdrawn, all without the knowledge and consent of your Affiant or the other legal heirs.

That upon investigation of the records in California, in the years of 1944 and 1945, it was discovered that Moses Hopkins and Samuel F. Hopkins and Mary Francis Sherwood Hopkins executed a deed to certain property located in Sacramento, California, and also in San Francisco, California, setting out in the body of said deed or deeds that they were the only heirs of Mark Hopkins. It was also dis-

covered in 1944 and 1945, that Samuel F. Hopkins and Moses Hopkins executed a purported deed to Mary Francis Sherwood Hopkins, for a 1/8 interest, each, of the estate of Mark Hopkins.

This the 7th day of February, 1946.

/s/ ESTELLE COTHRAN LATTA,  
Affiant.

Subscribed and Sworn to before me this 7th day of February, 1946.

(Seal)                      O. A. JOHNSON,  
Notary Public.

My Commission expires 6/7/47.

State of North Carolina,  
County of Durham—ss.

I, A. J. Gresham, deputy clerk of the Superior Court of Durham County, North Carolina, the same being a Court of Record, having an official seal, do hereby certify that O. A. Johnson whose name is subscribed to the certificate of proof, acknowledgment, or affidavit of the annexed instrument in writing, was, at the time of taking such proof, acknowledgment, or affidavit, a Notary Public in and for said County, duly commissioned and sworn and authorized to take and certify the same; and authorized by the laws of said State to take the acknowledgments and proofs of deeds or convey-

ances for land, tenements, or hereditaments in said State of North Carolina; and further that I am well acquainted with the handwriting of Notary Public and verily believe the signature to the certificate of proof, acknowledgment, or affidavit is genuine.

I do further certify that the law of this State requires a Notary Public to have a seal, and that the seal of O. A. Johnson hereto affixed is the seal of such Notary Public as required by the laws of this State.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Superior Court, at office in Durham, North Carolina, this 7th day of February, 1946.

(Seal)           /s/ A. J. GRESHAM,  
Deputy Clerk Superior Court.

No. 100219

North Carolina,  
Guilford County—ss.

In Re: Estate of Mark Hopkins

### AFFIDAVIT

Jones M. Griffin after being duly sworn, deposes and says: That he was born, August 13th, 1872, and is now 73 years of age, and resides in Guilford County, North Carolina.

That he is the son of Augustus Griffin, was the

son of Rebecca Hopkins Griffin, who is also deceased. That Rebecca Hopkins Griffin, was the daughter of Edward and Hannah Crow Hopkins, and a sister of Mark and Moses Hopkins, that your affiant well remembers his grandmother and heard her discuss the relationship of her family.

That your affiant further avers that in 1925 he with other heirs of Mark Hopkins had information from a man, whose name your affiant does not recall, that came to High Point from California and who stated that the heirs of Mark Hopkins in North Carolina had an undivided interest in the said Mark Hopkins estate. That he died intestate. That upon receiving said information the heirs in and around High Point had a meeting and devised plans and means to make the necessary investigation of said estate in California, and sent a man out there to make said investigation and empowered him to employ counsel. That immediately counsel was employed and the heirs have pursued said matter with due diligence ever since. They have contributed from time to time over a period of 20 years, thousands of dollars towards the prosecution of the matter, and have never let up or waived in their efforts to collect their interest, or have the matter litigated to a final determination, that they might know the true status and their rights in the said estate.

That during the time since 1925 and up to 1943, the heirs were informed from time to time by their said counsel and legal representative, that all avail-



able legal steps were being taken and that it was only a matter of time until their legal rights would be judicially determined, and the said estate would be closed. That said claimants believed and relied upon their said counsel and representative and continued to so believe and contribute funds for the prosecution of their claim, up to and until 1943, or thereabouts. That at said time those interested in said estate having lost confidence in the said representative referred to above, employed other counsel to investigate and to advise them as to what had been done and what could be done in the matter of their legal rights as heir claimants to the estate of said decedent.

That upon said investigation it was discovered that no proper legal steps had been taken towards the recovery of said estate, as is shown by the records filed in the Probate Court in the County and City of San Francisco, which speaks for themselves. The facts being that actions had been commenced in said court to that end, and without the knowledge or consent of the heirs whom they represented or any of them, had been withdrawn, that the said heirs had no knowledge of these facts until they had the facts investigated in 1944. That your affiant and other heirs had been informed and led to believe that litigation was pending all this time and it was only a matter of waiting the termination of same. That by reason of the information received by your affiant and the other heirs and relied upon, the heirs have been deceived and misled and as here-

tofore alleged, the heirs owing to the distance they reside from the scene of action, had relied upon their representatives and counsel, they have used due diligence in prosecuting their rights and interest in and to said estate.

Respectively submitted,

/s/ JONES M. GRIFFIN,  
Affiant.

Jones M. Griffin personally appeared before me and after being duly sworn, says, that he has read the foregoing affidavit and knows the facts to be true excepting those matters and things stated on information and belief, and to those matters and things he believes them to be true.

/s/ C. E. BILBVO,  
Ass't Clerk of Court—Guilford  
County, N. C.

No. 100219

North Carolina,  
Durham County—ss.

In the Matter of the Estate of Mark Hopkins

#### AFFIDAVIT

Alvin L. Chambers, after being duly sworn, deposes and says:

That he is the Son of William James Chambers and Mary Blalock Chambers.

That William James Chambers was the Son of Benjamin Chambers and wife Polly Hopkins Cham-

bers. That, Polly Hopkins Chambers, was the daughter of Joseph Hopkins, who was my great grandfather. Joseph Hopkins, was the son of Edward Hopkins and Hannah Crow Hopkins. That Joseph Hopkins was a brother of Mark Hopkins and Mose Hopkins.

This affiant further says, that he was born in Durham County, N. C., on the 7th day of April, 1881, that he is now over 64 years of age, and is a resident of Durham County, now and has been for over 64 years.

This the 7th day of February, 1946.

/s/ ALVIN L. CHAMBERS.

Sworn and subscribed to before me this 7th day of February, 1946.

(Seal) O. A. JOHNSON,  
Notary Public.

My Commission expires 6/7/47.

State of North Carolina,  
County of Durham—ss.

I, A. J. Gresham, deputy Clerk of the Superior Court of Durham County, North Carolina, the same being a Court of Record, having an official seal, do hereby certify that O. A. Johnson whose name is subscribed to the certificate of the proof, acknowledgment, or affidavit of the annexed instrument in

writing, was at the time of taking such proof, acknowledgment, or affidavit, a Notary Public in and for said County, duly commissioned and sworn and authorized to take and certify the same; and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of North Carolina; and further that I am well acquainted with the handwriting of Notary Public and verily believe the signature to the certificate of proof, acknowledgment, or affidavit is genuine.

I do further certify that the law of this State requires a Notary Public to have a seal, and that the seal of O. A. Johnson hereto affixed is the seal of such Notary as required by the laws of this State.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Superior Court, at office in Durham, North Carolina, this 7th day of February, 1946.

/s/ A. J. GRESHAM,

Deputy Clerk Superior Court.

[Endorsed]: Filed Jan. 13, 1947.

EXHIBIT L

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

No. 105869 Dept.

In the Matter of the Estate of Mark Hopkins, Deceased.

PETITION FOR LETTERS OF ADMINISTRATION  
DE BONIS NON

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco:

The petition of John T. Blount respectfully shows:

1. That the above named Mark Hopkins died on the 29th day of March, 1878; that at the date of his death, he was a resident of the City and County of San Francisco, State of California; and that at the time of his death left property in the State of California.

2. That due search and inquiry has been made to ascertain if deceased left any will and testament, but none has been found, and according to the best knowledge, information and belief of your petitioner, said decedent died intestate.

3. That letters of administration were heretofore issued on said estate of Mark Hopkins, deceased, to Mary Frances Sherwood Hopkins; that she was removed as administratrix of said estate on the 26th day of August, 1881; and that letters of



administration of said estate were then issued to Moses Hopkins, who served as administrator of said estate until a decree of final distribution was entered in said estate on or about the first day of November, 1883.

4. That said Moses Hopkins is dead.

5. That there was left unadministered and undistributed by said decree of final distribution the sum of eight hundred sixteen (\$816.00) dollars; that it is necessary an administrator of said estate be appointed; and that letters of administration be issued herein.

6. That the property of said estate left unadministered is said sum of eight hundred sixteen (\$816.00) dollars, and that your petitioner is informed and believes, and therefore alleges that there is other property belonging to said estate left unadministered, the value of which is unknown to your petitioner.

7. That the names, ages and post office addresses of the heirs of said decedent, so far as known to your petitioner, are as follows:

(a) J. O. Chambers, a nephew, over the age of majority, and residing at R.F.D., Durham, North Carolina.

(b) Jones M. Griffin, a nephew, over the age of majority, and residing at R.F.D., High Point, North Carolina.

(c) Alvin L. Chambers, a nephew, over the age of majority, and residing at R.F.D., Durham, North Carolina.

(d) Estelle C. Latta, a grand niece, over the

age of majority, and residing at College Station, Durham, North Carolina.

(e) Della S. Russell, a grand niece, over the age of majority, and residing at Eldorado, Montgomery County, North Carolina.

8. That your petitioner is a resident of the County of Sacramento, State of California, and is a person legally competent to administer upon said estate of Mark Hopkins, deceased.

Wherefore, your petitioner prays that the clerk of this Court set the above petition for hearing according to law, and that letters of administration de bonis non be issued to him, and for such other and further relief as to the Court shall seem meet and just.

Dated: Sacramento, California, January 24th, 1947.

GEORGE L. POPERT,  
Attorney for Petitioner.

State of California,  
County of Sacramento—ss.

John T. Blount, being first duly sworn, deposes and says:

That he is the petitioner in the above entitled matter; that he has read the foregoing Petition for Letters of Administration and knows the contents thereof; that the same is true of his own knowledge,

except as to matters which are therein stated on information or belief, and as to those matters he believes it to be true.

JOHN T. BLOUNT.

Subscribed and sworn to before me this 24th day of January, 1947.

(Seal)                      GEORGE L. POPERT,  
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Jan. 28, 1947.

EXHIBIT M

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

Department No. 9 Probate

Court met: present Hon. T. I. Fitzpatrick, Judge,  
and officers of the court.

No. 105869

In the Matter of the Estate of Mark Hopkins, Deceased.

ORDER

Petition of John T. Blount for letters of administration—Denied. Mar. 19, 1947.

G. J. ROMANI,  
D.C.C.

EXHIBIT N

In the Matter of the Estate of Mark Hopkins, Deceased.

PETITION FOR LETTERS OF ADMINISTRATION DE BONIS NON

To the Honorable, The Superior Court of the City and County of Sacramento, State of California:

Your petitioner, Norman Lee Freeman, represents that he is a resident of the County of Alameda, State of California;

That on or about the 29th day of March, 1878, Mark Hopkins died in the County of Yuma, the then Territory of Arizona, leaving no will;

That on the third day of June, 1878, Mary Frances Sherwood Hopkins was appointed Administratrix of the above named decedent; that later said Administratrix was removed and in her place and stead, Mose Hopkins, was appointed Administrator on the 10th day of November, 1881; that the said Administrator on the 1st day of November 1883 closed the administration of said Estate, leaving a part of said Estate unadministered; that the said Administrator has since died;

That the said decedent left real property of said Estate unadministered, which as your petitioner is informed and believes, amounts to a sum in excess of \$30,000,000.00;

That the said decedent left personal property located in this State, which as the petitioner is in-

formed and believes, amounts to an amount exceeding the sum of \$20,000,000.00;

Wherefore, your petitioner prays that Letters of Administration de bonis non upon said Estate issue to your petitioner, as provided by law.

/s/ NORMAN LEE FREEMAN,  
Petitioner.

JAMES H. LONGDON,  
Attorney for Petitioner.

[Endorsed]: Filed Sept. 30, 1931.

State of California,  
County of Sacramento—ss.

I, C. C. LaRue, County Clerk of the County of Sacramento, State of California, and ex-officio Clerk of the Superior Court held in and for said County and State aforesaid, hereby certify that I have compared the foregoing copy with the original instrument on file and of record in my office, and that the same is a full, true and correct copy of such original, with the endorsements thereon, and of the whole thereof.

Attest my hand and seal of said Court this July 18, 1947.

(Seal)

C. C. LaRUE,  
County Clerk.



EXHIBIT O

State of California, County of Sacramento. Superior Court Probate Record Monday, November 9th, A.D. 1931. Dept. Two.

In the Matter of the Estate of Mark Hopkins, Deceased.

MINUTE ORDER

Petition for Letters of Administration. Petition for Letters of Administration, Denied.

Said Minute Order Recorded in Probate Record Book 119 at page 379, in the office of the County Clerk of the County of Sacramento, State of California.

State of California,  
County of Sacramento—ss.

I, C. C. LaRue, County Clerk of the County of Sacramento, State of California, and ex-officia Clerk of the Superior Court held in and for said County and State aforesaid, hereby certify that I have compared the foregoing copy with the original instrument on file and of record in my office, and that the same is a full, true and correct copy of such original, with the endorsements thereon, and of the whole thereof.

Attest my hand and seal of said Court this July 18, 1947.

(Seal)

C. C. LaRUE,  
County Clerk.

[Title of District Court and Cause.]

MOTION TO DISMISS ON BEHALF OF DEFENDANT SOUTHERN PACIFIC RAILROAD COMPANY

Comes now Defendant Southern Pacific Railroad Company (hereinafter called "Defendant") and moves the Court for an order dismissing the complaint herein, upon the following grounds:

I.

The complaint fails to state a claim against Defendant [75] upon which relief can be granted.

II.

Complaint fails to state a claim against Defendant upon which relief can be granted, in the following particulars:

(a) the complaint fails to state a cause of action in favor of the plaintiffs, or any of them, or in favor of any or all the persons on whose behalf said action is brought against Defendant, or any of the defendants, in said action:

(b) it appears from said complaint and from the affidavit of Royal E. Handlos hereinafter referred to that plaintiffs and their ancestors have been guilty of gross laches, that the alleged claims therein stated are stale, and that so long a time has elapsed since the matters and things complained of are alleged to have taken place that it would be contrary to equity and good conscience for the Court to take cognizance thereof in this proceeding:

(c) it appears from said complaint and from said affidavit of Royal E. Handlos that the alleged

cause of action is barred by the provisions of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California;

(d) it appears from said complaint and from said affidavit of Royal E. Handlos that the alleged cause of action is barred by the provision of Section 343 of said Code.

(e) the complaint fails to show that plaintiffs, or any of them, or any of those on whose behalf said action is brought, were the heirs of Mark Hopkins at the time of his death, or that they, or any of them, have succeeded to the interests of such heirs, or any of them;

(f) that the complaint fails to show that Defendant has been guilty of any fraud or that Defendant or any of its predecessors ever had any knowledge of any facts which would have put [76] it or them upon inquiry with respect to any fraud in the premises.

(g) that the complaint fails to allege any extrinsic fraud which might form the basis of any cause of action.

(h) the complaint fails to show that the decree of distribution in the Estate of Mark Hopkins. Deceased, was void upon its face, or otherwise, or at all, it affirmatively appearing from the allegations of said complaint and from copy of said decree annexed to said complaint as Exhibit A that said decree was and is valid, all inclusive, and final.

(i) it appears from said complaint and from said affidavit of Royal E. Handlos that the matter is *res adjudicata*; petitions for letters of administration *de bonis non* upon the Estate of Mark Hopkins, Deceased, having been filed in Superior Courts of the State of California, the orders of the said Superior Courts denying such petitions are final.

(j) the complaint fails to allege the relationship of plaintiffs and those on whose behalf this action is brought to those referred to in the complaint as the brothers and sisters of Mark Hopkins, Deceased, and fails to show whether or not and wherein the plaintiffs or any of said persons were entitled to distribution of the whole or any part of the estate of said decedent.

### III.

The Court lacks jurisdiction over the subject matter.

### IV.

The Court lacks jurisdiction over persons who are necessary and indispensable parties to said action; that is to say, the heirs and successors in interest of Moses Hopkins and Mary Frances Sherwood Hopkins, necessary and indispensable parties to said action, are not included among either the defendants or the plaintiffs herein or among those for whom this action has been brought, and that the Court lacks jurisdiction over said necessary and indispensable parties hereto. [77]

## V.

The complaint fails to state a claim within the jurisdiction of this Court in so far as it seeks to have this Court determine who were in fact the heirs of Mark Hopkins, Deceased.

## VI.

The complaint fails to state a claim within the jurisdiction of this Court in so far as it seeks to compel the appointment of an administrator de bonis non.

Said motion will be based upon the pleadings, records and files in this case; upon the pleadings, records and files of this Court in the case of Norma Lee Freeman et al. v. Timothy Nolan Hopkins et al., in Equity No. 1842: upon the affidavit of Royal E. Handlos filed in conjunction with motion to dismiss on behalf of Defendant Ira Jones et al.; upon the affidavit of Roy G. Hillebrand hereto attached; upon this notice; and upon such oral and documentary evidence as may be adduced at the hearing upon this motion and that of defendants Ira Jones et al.

\* \* \* \*

To the Plaintiffs above named, and to Messrs. Busick & Busick, Charles H. Seecombe, Esq., S. J. Bennett, Esq., Walter H. Siler, Esq., and Carlyle Higgins, Esq., their attorneys:

Please take notice that the foregoing motion will be brought before the above named Court for hearing on the 18th day of August, 1947, at ten o'clock a.m. of said day, or as soon thereafter as counsel



can be heard, at the Courtroom of said Court in the Post Office Building in the City of Sacramento, State of California.

Dated: August 5th, 1947.

DEVLIN & DEVLIN &  
DIEPENBROCK,  
R. S. MYERS,  
E. J. FOULDS,

Attorneys for Defendant Southern Pacific Railroad  
Company.

[Endorsed]: Filed Aug. 11, 1947. [78]

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State of California,  
City and County of San Francisco—ss.

**AFFIDAVIT OF ROY G. HILLEBRAND**

Roy G. Hillebrand, being first duly sworn, deposes and says:

That he is, and for about 12 years last past has been, Secretary of Southern Pacific Railroad Company, a defendant in Civil Action No. 5811 pending in the District Court of the United States in and for the Northern District of California, Northern Division.

That said Southern Pacific Railroad Company is a corporation created by consolidation of corporations under the laws of California, Arizona and New Mexico in the year 1902. As Secretary of said corporation affiant has charge of its corporate books and records.

That ever since the said date of its incorporation the principal place of business and office of said defendant Southern Pacific Railroad Company has been and still is in the City and County of San Francisco, State of California, and at all of said times all of its corporate books and records have been and are kept therein, that on April 18, 1906, there was a general conflagration in the City and County of San Francisco in which the office building containing all of the corporate books and records of said defendant, including all of said corporate books and records, were destroyed by fire. Among the records so destroyed were the records of ownership and of all transfers of the capital stock of said defendant theretofore maintained by it, and the records of any bonds or other securities which may have been in its possession at that time, or at any time prior [79] thereto.

That immediately after said general conflagration said books and records of said defendant were reopened, commencing with their then current status, according to the best secondary information obtainable, and all subsequent matters involving stocks, bonds and other securities of said defendant are fully shown upon its corporate books and records.

There is no record whatsoever in said books of said Southern Pacific Railroad Company as they have existed since said general conflagration indicating that any stocks or bonds or other securities of said defendant, or at any time held by it, now or at any time ever belonged to Mark Hopkins or the Estate of Mark Hopkins, Deceased, or, so far

as they can be identified, to any person, firm or corporation which may have succeeded to said Estate or any part thereof, either as of the time of the reopening of the books and records of said company in 1906 or at any time prior thereto, or any time subsequent thereto; and, so far as known to affiant, there is now no living person who would have any information or could give testimony, regarding any stock issuance by said defendant or any stock or bonds in its possession, or transfers of its stock, or of any securities in its possession, prior to 1906.

By reason of said change in conditions it is impossible at this time to secure authentic information as to the matters aforesaid prior to the date of said general conflagration, and the delay in the commencement of said action Civil No. 5811 until after said general conflagration of 1906, and until after the death of all persons having any knowledge of said matters, has materially prejudiced defendant in its ability to defend said action. [80]

ROY G. HILLEBRAND.

Subscribed and sworn to before me this 5th day of August, 1947.

(Seal)

RUTH W. GEORGE,

Notary Public, in and for the City and County of  
San Francisco, State of California.

My commission expires September 19, 1950. [81]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FILED ON BEHALF OF SOUTHERN PACIFIC RAILROAD COMPANY

I.

This defendant adopts the points and authorities filed in connection with the motion to dismiss filed on behalf of defendant Ira Jones, et al., and, in addition submits the following:

II.

In 1878, when letters of administration upon the estate of Mark Hopkins were first applied for, the law only required notice by posting. Allegations of par. 15, pp. 4-5 and Par. B, p. 6, of complaint do not show that notice was not given to the extent then required by law.

Section 1373, Code of Civil Procedure, as it existed up to 1921. (Compare Sec. 441 of present Probate Code.)

This notice constituted due proces of law, and gave Probate Court jurisdiction to issue letters of administration.

Estate of Bump, 152 Cal. 274.

III.

In 1883, when the decree of final distribution of estate of Mark Hopkins was entered, the law only required notice by posting or publication. Allegations of par. 17, pp. 5-6, of the complaint do not show that notice was not given to the extent required by law.

Section 1668, Code of Civil Procedure, as it existed in 1883 and up to 1893. (Compare Sec. 1200 of the present Probate Code.)

Due notice having been given as required by the statute then existing, both with respect to the application for letters of administration and with respect to the petition for final distribution, it is immaterial whether or not the alleged brothers and sisters of the decedent had actual notice thereof, the decree being in rem. (82)

Murray v. Calkins, 191 Minn. 460, 254 N. W. 605; Cunha v. Hughes, 122 Cal. 111; The William Hill Co. v. Lawler, 116 Cal. 359; Mulcahey v. Dow, 131 Cal. 73; Goodrich v. Ferris, 145 Fed. 844; Beltran v. Hynes, 40 Cal. App. 177; Benning v. Nevis, 56 Cal. App. 192.

#### V.

The presumption is that everything was done which was requisite to sustain jurisdiction.

Estate of Davis, 151 Cal. 319; French v. Phelps, 20 Cal. App. 101; Dane v. Layne, 10 Cal. App. 366; Benning v. Nevis, 56 Cal. App. 192.

#### VI.

The claim is barred by laches. In addition to authorities cited on behalf of defendant Ira Jones, et al., see Holmberg v. Anchell, 24 F. Supp. 594, at 602, holding that to overcome the presumption that a claim is stale, it is necessary among other things to show that the plaintiff has used due



diligence under the circumstances in pressing his claim as against the defendants whom he seeks to hold, "and that said defendants were not prejudiced by any delay in so doing."

## VII.

The Court lacks jurisdiction of necessary and indispensable parties, the heirs and legatees of Mary Frances Sherwood Hopkins and Moses Hopkins.

The Court cannot proceed without such indispensable parties.

O'Brien v. Markham, 17 F. Supp. 633. (83)

Service of the foregoing Motion, Affidavit and Points and Authorities, by copy, is hereby admitted this 8th day of August, 1947.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
WALTER H. SILER,  
CARLYLE HIGGINS,  
Attorneys for Plaintiffs. (84)

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 18th day of September, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Court and Cause.]

This case came on regularly for hearing on the motions to dismiss; to quash service of summons and hearing on proposed interrogatories. Charles H. Seccombe, Esq., C.O. Busick, Esq., C. W. Higgins, Esq. and S. J. Bennett, Esq., were present for and on behalf of the plaintiffs. E. J. Foulds, Esq., Horace Wulff, Esq., Edward D. Landels, Esq. and Royal A. Handlos, Esq. and J. Francis O'Shea, Esq. were present for and on behalf of the defendants. Thereupon Mr. Handlos, Mr. Foulds, Mr. O'Shea and Mr. Landels were heard in support of the motion to dismiss and Mr. Handlos introduced and filed Defendants' Exhibits A and B. The parties hereto entered into an oral stipulation that the Central Pacific Railroad Co. appear herein as a party to the Southern Pacific Company's motion to dismiss; that the motion to quash service of summons and the motion to strike plaintiff's First Amendment to Plaintiff's Complaint be withdrawn. Thereupon Mr. Busick, Mr. Seccombe and Mr. Bennett were heard in opposition to the motion to dismiss. After hearing the Attorneys, it is Ordered

that the Plaintiffs be and they are hereby allowed to file affidavits in opposition to the motion. to dismiss. It is further Ordered that the Plaintiffs be and they are hereby permitted to file their proposed interrogatories and the Defendants are allowed a reasonable time in which to file cross-interrogatories. It is further Ordered this case be and the same is hereby continued to September 26, 1947.

State of North Carolina,  
County of Gilford—ss.

Jones M. Griffin, being first duly sworn deposes and says:

That he is of the age of 75 years and resides in Gilford County, North Carolina, in which county affiant has resided all his life; that he is a direct descendant of Rebecca Hopkins Griffin, who was a sister of Mark Hopkins; that said sister of Mark Hopkins and all the other antecedents of affiant are now dead; due to the distance from North Carolina to California, to-wit; about 3,000 miles; affiant and other heirs of Mark Hopkins residing in North Carolina did not learn of the death of Mark Hopkins until some years after 1878; at which time upon inquiry of several of said heirs they were informed by Moses Hopkins, a brother of said decedent, that Mark Hopkins had died leaving a wife and nine children. With this information the matter of any Estate of Mark Hopkins was dismissed from the minds of the plaintiffs, heirs of Mark Hopkins, until about the year 1925, affiant and other heirs of Mark Hopkins in North Carolina first learned

that Mark Hopkins died intestate and left no wife and children and left an estate.

That affiant and other heirs in North Carolina thereupon held a meeting and proceeded to obtain information as to the Estate.

That thereupon investigations were made of records in the State of North Carolina, Virginia and other Eastern states and numerous interviews were had in these several states to obtain the necessary evidence of the lineage of affiant and the other heirs of said Mark Hopkins.

That said investigations were carried on with thoroughness over a number of years and not only disclosed the sources of evidence of the relationship of affiant and other heirs of Mark Hopkins but also disclosed that Mary Frances Sherwood Hopkins was not the wife of Mark Hopkins, deceased, and that Samuel F. Hopkins was not a brother of said Mark Hopkins, deceased.

That investigations thereupon were conducted in the City and County of San Francisco, California, the residence of Mark Hopkins at the time of his death.

That it was then learned that the records of all proceedings in the Matter of the Estate of Mark Hopkins, deceased, had been destroyed in the fire of 1906.

Upon investigation it was found that one, W. Percy McCardless, et al. had filed a petition on August 18, 1925, verified by James H. Longden, Attorney, in the Superior Court of the State of California, in and for the City and County of San

Francisco, being No. 8494, relating and pertaining to the estate of Mark Hopkins and that said petition had been withdrawn on February 25, 1927, by the petitioner. And affiant states that said W. Percy McCandless was not an heir of Mark Hopkins nor a descendant of Edward and Hannah Crow Hopkins, the parents of said Mark Hopkins, or in any manner related to Mark Hopkins.

That it was also learned that one, F. B. McCandless of the State of Washington had filed in the Superior Court of the State of California, in and for the City and County of San Francisco, being No. 38991, a Will, and had petitioned said Court, that said Will be admitted to probate as the last Will and Testament of Mark Hopkins, deceased, and that he, said petitioner, be granted letters thereon; that in said proceeding one, John Marshall Jones Freeman had filed an Answer protesting the probate of said Will and alleging that it was a forged instrument.

That the attorney for the petitioner, having admitted at the hearing in open Court that said Will was a forged instrument, the Will was denied admission to probate; and affiant alleges that said F. B. McCandless was not a descendant of Edward and Hannah Crow Hopkins, father and mother of Mark Hopkins.

That during the years from 1925 to the date of the commencement of this action, affiant and other heirs of Mark Hopkins residing in the State of North Carolina, pursued with diligence, investigations of the Estate of Mark Hopkins, to ascertain



the facts regarding the existence and location of the Estate of Mark Hopkins, deceased, if any, and in the year 1945, ascertained from the records mentioned in plaintiffs' complaint, of the fraudulent acts of the Administratrix and Administrator of said Estate, and of the proceedings had in the probate of said Estate. In such investigation it was necessary, in order to ascertain the facts by reason of the San Francisco fire of 1906, to investigate the records in practically every County in the State of California, before they obtained knowledge of the frauds of said Administratrix and Administrator.

That it was not until 1945 that such investigations disclosed that the bulk of the Estate of Mark Hopkins was not set out nor distributed in the decree of distribution; that Mary Frances Sherwood Hopkins, Moses Hopkins and Samuel F. Hopkins had fraudulently conspired together to attempt to transfer said real estate without the knowledge or consent of the Court having jurisdiction of the probate proceedings or authority of said Court, as shown by Exhibits A., C., and D. of Plaintiffs' Complaint, and had conspired together to profit by said fraudulent acts and attempted transfers to defraud affiant and the other lineal descendants of the brothers and sisters of Mark Hopkins and heirs of his said estate as set forth in plaintiffs' complaint herein; that Moses Hopkins, the administrator of said Estate, had fraudulently, and as a part of said conspiracy, reported to said Court as appears from the decree of dis-

tribution Exhibit A., certain personal property to wit: stocks and bonds of railroad and other corporations which at the time of the granting of said decree were no longer in existence and failed to report to the Court as shown by the inventory, property, of the value of approximately twenty-five million (\$25,000,000.00), that was known and in the hands of the administrator at the time of said purported distribution.

/s/ JONES M. GRIFFIN.

Subscribed and sworn to before me this 29th day of September, 1947.

(Seal) /s/ M. W. NASH,

Clerk of Municipal in and for the County of Gilford and City of High Point, State of North Carolina.

### AFFIDAVIT OF SERVICE BY MAIL

(C. C. P. 1013A)

(Must be attached to original or a true copy of paper served)

No. 4811-Latta, et al. vs. Western Investment Co., a Corp., et al.

State of California,  
County of Sacramento—ss.

Ramona A. Furrow, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Sacramento County, and not a party to the **within action**.

That affiant's business address is 604 Bank of America Bldg., Sacramento, California.

That affiant served a copy of the attached affidavit of Jones M. Griffin by placing said copy in an envelope addressed to Messrs. Landels and Weigel at their office address, 275 Bush Street, San Francisco, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on October 2nd, 1947, deposited in the United States mail at Sacramento, California.

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me on October 2nd, 1947.

(Seal)      /s/ CHARLES O. BUSICK.

Notary Public in and for said  
county and state.

/s/ RAMONA A. FURROW.

[Endorsed]: Filed Oct. 2, 1947. C. W. Galbreath,  
Clerk.

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[Title of District Court and Cause.]

### ORDER

Sixty-four years elapsed between the entry of the decree of distribution attacked herein and the commencement of this action. The records in the probate proceeding were destroyed in the San Francisco fire of 1906, the lips of the two persons who are claimed to have acted fraudulently, as well as those of most if not all the other witnesses, are

sealed in death, memories of living witnesses are dimmed through the passage of time and the property here involved has passed to other hands. Under these circumstances, plaintiffs must allege facts which negative laches. Plaintiffs allege discovery by them of the facts first in 1945. There is no averment as to whether their ancestors or any of them knew the facts during their lifetimes. If an ancestor's right was barred it did not revive. It is not alleged that none of the relatives of the estate had knowledge of the falsity or of the true facts. It is also very questionable whether there is a sufficient explanation why the facts could not have been discovered by either the ancestors or plaintiffs during this long interval.

The averments of intrinsic fraud do not avail plaintiffs. Neither may they predicate a cause upon matters which are finally determined in the decree, however erroneously they may have been decided.

It is also to be noted that the decree of distribution was entered in November, 1883. The fraudulent representations upon which plaintiff would predicate fraud are alleged [86] to have been made in the "early eighties." This is an evasive allegation. If they were made after the decree became final they do not amount to actionable fraud.

The motions to dismiss are granted.

Dated April 27, 1948.

DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket April 28, 1948.

[Endorsed]: Filed April 27, 1948. [87]

[Title of District Court and Cause.]

### MEMORANDUM AND ORDER

Counsel for plaintiffs calls the court's attention to the paragraph beginning on line 20 of page 13 of their complaint. It is there alleged that the heirs of Mark Hopkins "never knew of the aforesaid false and fraudulent acts of said administrator." This must be read in connection with the preceding clause "That at and during the whole period of probate of said estate \* \*." This is not an allegation that the fraud was not discovered subsequent to the conclusion of the probate. The averments in paragraph 18, to which attention is also called, are to the effect that the plaintiffs and their ancestors did not receive notice of the petition for settlement of the account and final distribution and "never knew that the purported decree of distribution had been ordered or made or entered" does not remedy the want of allegation that the fraud was not discovered by the ancestors during their lifetimes.

Plaintiffs' motion to set aside the order of dismissal is denied. The motion to amend the order is granted to the extent of this memorandum; otherwise it is denied.

**Dated: June 17, 1948.**

**DAL M. LEMMON,**  
United States District Judge.

[Endorsed]: Filed June 17, 1948. [88]



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Estella Latta, Jones M. Griffin and Alwin Chambers, Plaintiffs above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the Order and Judgment granting defendants' Motions to Dismiss the above-entitled action, made and entered on the 27th day of April, 1948, and from the Order Denying Plaintiffs' Motion for a new trial and to set aside the Order of Dismissal and [89] from the Order Amending the Original Order in part and denying Plaintiffs' Motion to Amend the Order Dismissing said action, made and entered on the 17th day of June, 1948, and from the whole thereof.

Dated: June 23rd, 1948.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
Attorneys for Plaintiffs.

[Endorsed]: Filed June 24, 1948. [90]

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[Title of District Court and Cause.]

POINTS UPON WHICH APPELLANTS RELY

1. The Court erred in granting defendants' motion to dismiss.
2. That under the rules of the Court in force

when this action was filed, and motion made and submitted, (September 18, 1947) limitations and laches were matters of defense that must be pleaded.

3. That laches does not begin to run until there is full knowledge and notice of the facts.

4. That the Complaint specifically alleges that Plaintiffs and their ancestors had no knowledge or notice of the fraud or concealment of the facts, prior to 1945.

5. That the Complaint alleges facts showing that plaintiffs have used due diligence.

6. That where there is concealment of facts, or where plaintiffs have been misled by the interested party, laches does not run until full discovery of the facts.

7. That laches or limitations do not run against a void instrument, or a judgment procured by extrinsic fraud, or a judgment procured where the court does not have the authority to [91] render the same.

8. That the appointment of Moses Hopkins as Administrator, and the proceedings had thereafter, are void, in that the allegations of the complaint show that Moses Hopkins had been, prior to said appointment, convicted of an infamous crime.

9. That the decree is void by reason of the fraud practiced upon the court and the heirs, and other reasons, set out as follows, to wit:

(a) In the filing of the applications for Letters of Administration, both Moses Hopkins and Mary Frances Sherwood Hopkins, failed to furnish the

court with the names and addresses of the heirs other than Moses Hopkins and the heirs had no notice and no opportunity to be heard, as shown on the face of the decree.

(b) That Moses Hopkins, in filing his report, reported only a minor portion of the real and personal property belonging to said estate, and on the other hand, reported property that was not in existence at the time.

(c) That the decree failed to distribute all of the cash on hand, to wit: \$816.00.

(d) That the Court exceeded its authority in attempting to distribute three-fourths of the estate to Mary Frances Sherwood-Hopkins, if she was the wife of deceased.

(e) That the decree fails to describe the real estate attempted to be distributed, and recognized and based its distribution upon an agreement between Mary Frances, Moses, and Samuel, and is indefinite in its findings.

(f) That the decree recognized Mary Frances and Samuel as heirs and distributees, as was represented by the Administrator, Moses Hopkins. [92]

(g) That the deed from Moses and Samuel Hopkins to Mary Frances Sherwood-Hopkins, (Exhibit "B") is void for lack of description of the property attempted to be conveyed, and was executed while the Grantee was acting in a fiduciary capacity as Administratrix.

(h) That the deed from Mary Frances, Moses, and Samuel to Huntington et al, (Exhibit "C") is void in that it was executed without an order or

confirmation of the Probate Court, and while Mary Frances was acting as Administratrix, and signed by her individually, and said deed fails to show such authority on the face thereof. And the same thing applies to the deed executed by Ellen Colton to the Ione Coal and Iron Co., in which Mary Frances, Moses, and Samuel joined in attempting to pass title to the interest held by the Estate. (Exhibit "D".)

(i) That the conveyance of all the property referred to in paragraphs 49 and 50 of the Complaint is null and void, for the reason that said property was not sold under order of the Court, and said sale was not reported to or confirmed by the Probate Court, and the consideration received therefor was never accounted for in the Estate.

(j) That the defendants took said purported title to the properties referred to in Paragraphs 49 and 50 of the complaint, with Notice of the defects of record, and are not innocent purchasers for value.

(k) That said deeds were not executed by all the heirs of Mark Hopkins.

Dated: June 25th, 1948.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
Attorneys for Plaintiffs.

[Endorsed]: Filed June 26, 1948. [93]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the clerk of the above entitled court and to the attorney for defendants:

Plaintiffs and Appellants above named hereby designate the portions of the Record, and proceedings to be contained in the Record on Appeal to the Circuit Court in the above entitled action.

1. The Complaint, as amended.
2. Defendants' Motions to dismiss action.
3. Order and Judgment of the Court, on motion to dismiss action.
4. Order of the Court on Motion for New Trial, or to amend Order Dismissing Action.

Dated: June 25th, 1948.

BUSICK & BUSICK,  
S. J. BENNETT,  
CHARLES H. SECCOMBE,  
Attorneys for Plaintiffs.

[Endorsed]: Filed June 26, 1948. [94]

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[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTION  
OF THE RECORD ON APPEAL UNDER  
RULE 75(a)

To the clerk of the above entitled court and to the attorneys for plaintiffs:

The undersigned, the defendants in the above entitled action, hereby designate additional portions



of the record and proceedings to be contained in the record on appeal to the Circuit Court of Appeals, in and for the Ninth Circuit, in the above entitled action:

1. Affidavit of Royal E. Handlos in support of motion to dismiss and the exhibits thereto attached.

2. Minute order of September 18, 1947, wherein it was ordered that the Central Pacific Railroad Company appear therein as a party to Southern Pacific Company's motion to dismiss.

Dated: July 1, 1948.

/s/ ROYAL E. HANDLOS,

Attorney for Ira Jones, Claude A. Beagle, Vera G. Beagle, Roger L. Bondi, Joseph Devincenzi, Matilda Devincenzi, Verne Lewis, Lera M. Lewis, Drusilla M. Peip, Fred Bardoni and Louis H. Marks. [95]

/s/ LANDELS & WEIGEL,

Attorneys for Vera Peniz, Charles S. Howard Company, Inc., John V. Noonan and Jean Lillard.

/s/ DRIVER, DRIVER & DRIVER,

Attorneys for Grace Lee, Fred Fong and Armade Zambra, also known as Vicente Armada Zambra, Confucius Church of Sacramento, a corporation.

/s/ J. FRANCIS O'SHEA,

Attorney for Jennie T. Stoll.

/s/ T. L. CHAMBERLAIN,

Attorney for Sacramento Investment Company, a corporation.

/s/ DEVLIN & DEVLIN &  
DIEPENBROCK,

Attorneys for Southern Pacific Railroad Company,  
a corporation, and Central Pacific Railroad  
Company, a corporation.

/s/ R. S. MYERS and  
E. J. FOULDS,

Attorneys for Southern Pacific Railroad Company,  
a corporation, and Central Pacific Railroad  
Company, a corporation.

Due and Personal Service by Receipt of Copy  
hereof is hereby Admitted this 1st Day of July,  
1948.

BUSICK & BUSICK,  
Attorney for Plaintiffs.

[Endorsed]: Filed July 1, 1948. [96]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING  
AND DOCKETING RECORD ON APPEAL**

Good cause therefore appearing, it is Hereby Ordered that the time for filing the Record on Appeal in the above entitled action, and docketing the appeal, be and the same is, hereby extended to and including September 1, 1948.

Dated: July 15th, 1948.

**DAL M. LEMMON,**

Judge of the United States District Court for the  
Northern District, of California.

AM. Rule 73 (g).

[Endorsed]: Filed July 15, 1948. [97]

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[Title of District Court and Cause.]

**CERTIFICATE OF CLERK**

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 97 pages, numbered 1 to 97, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Estella Latta, et al. vs. Western Investment Company, et al., No. 5811, as the same now remain on file and of record in this office; said record having been prepared pursuant to and in accordance with Designation and Counter-designation of Portions of the Record to be con-

tained in the Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Sixteen and 90/100 (\$16.90) Dollars, and that the same has been paid by me by the attorneys for the appellants herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 21st day of July, A. D. 1948.

(Seal)

C. W. CALBREATH,  
Clerk. [98]

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[Endorsed]: No. 11990. United States Court of Appeals for the Ninth Circuit. Estella Latta, Jones M. Griffin and Alwin Chambers, Appellants, vs. Western Investment Company, a Corporation, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed: July 22, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.





No. 11,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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ESTELLA LATTA, et al.,

*Appellants,*

VS.

WESTERN INVESTMENT COMPANY, et al.,

*Appellees.*

BRIEF FOR APPELLANTS.

---

BUSICK & BUSICK,

Bank of America Building, Sacramento 14, California,

CHARLES H. SECCOMBE,

3124 E. 14th Street, Oakland, California,

S. J. BENNETT,

Fidelity Bank Building, Durham, North Carolina,

*Attorneys for Appellants.*

FILED

SEP 2 - 1948

PAUL P. O'BRIEN,



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No. 11,990

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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ESTELLA LATTA, et al.,

*Appellants,*

vs.

WESTERN INVESTMENT COMPANY, et al.,

*Appellees.*

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## BRIEF FOR APPELLANTS.

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### STATEMENT OF FACTS.

The preamble of the Court's order is forcible on the the question of laches, if the Court should stop there, but when the Court investigates the facts alleged in the complaint, the scene will change, and the Court's mind will conceive from the face of the record a gigantic fraud practiced upon the Court, as well as on the heirs of Mark Hopkins, that should be corrected even though 64 years has elapsed.

It is admitted that 64 years has elapsed since the signing of the purported decree. It is also admitted that the original records in the probate proceedings were destroyed by fire in 1906, which is one of the vital reasons of the delay in the commencement of this action, but the necessary records in the case

upon which the plaintiffs and defendants must rely were recorded elsewhere in the state, and the plaintiffs have furnished the defendants copies attached to the complaint.

It is also admitted that the lips of those charged with fraud are closed in death, but they left foot prints in the sands of time, of their fraudulent acts which have lived after them, a fraud that was purposely wrapped in secret and kept from the heirs who lived three thousand miles from the scene of action, and who were handicapped in their investigation by the death of the parties and the destruction of the records, this fraud was conceived and planned, and runs through the entire administration of the estate, as the records disclose.

It is admitted, that the property has passed into the hands of others, this brings us to the vital question, who should suffer, the parties who have been victimized by reason of the fraudulent acts of those who knowingly perpetrated the fraud on the brothers and sisters of Mark Hopkins, and their descendants, or those who came into possession of the property in the face of the records with constructive notice such as the decree of distribution which was recorded in every county in the state where the deceased had property. (Ex. A.)

As well as the deeds on record that did not convey title out of the estate, the deed from Moses and Samuel to Mary Francis, attempting to convey all their interest while she was acting in a fiduciary



capacity as administratrix, that is void on its face. (Ex. B.) And the deed from Mary Francis, Moses and Samuel to Huntington, et al., also executed during the purported administration of Mary Francis, signed by her individually and without an order or confirmation of the Court, and before the debts of administration were paid. (Ex. C.) And the same thing as to the deed to the Lone Coal and Iron Co. (Ex. D.) These documents were recorded and notice to the world. Time even 64 years under the circumstances and facts alleged in the complaint, should not be permitted to defeat the rights of the plaintiffs, and the greatest fraud ever perpetrated in the State, should not be condoned by the Courts.

We state briefly the history of the probate proceedings. Mark Hopkins died intestate the 29th day of March, 1878, leaving eight brothers and sisters, seven of whom lived in North Carolina. Moses was the only heir living in California.

Mary Francis Sherwood, who claimed to be the wife of the deceased, which the complaint alleges is not true (Paragraph 19, Subsec. "W" of Complaint), made application and was appointed administratrix of the estate, on/or about the third day of June, 1878.

On March 13, 1880, Samuel F. Hopkins, in no way related to Mark Hopkins and Moses Hopkins executed a purported deed (Ex. B) to Mary Francis Sherwood Hopkins, which contained the following description: "All of their right, title and interest to and in all real estate of which the said Mark Hop-

kins died, seized and possessed, situated, lying and being within the State of California, the interest of each of said parties of the first part in said real estate being one undivided eighth part.” (Complaint Ex. C.)

On April 5, 1879, and prior to the execution of the above deed, Samuel F. Hopkins of St. Clair, Michigan, in no way related to Mark Hopkins, Moses Hopkins of Sutter County, and Mary Francis Sherwood Hopkins, being the purported wife and brother of Mark Hopkins, executed a purported deed to Collis P. Huntington et al., attempting to convey the real estate and personal property of Mark Hopkins, deceased, in the business property and assets of the late firm of Huntington and Hopkins & Co., a partnership, the consideration one dollar. (Complaint Ex. D.)

On January 16, 1880, and prior to the execution of the deed from Moses and Samuel to Mary Francis above referred to, Mary Francis, Moses and said Samuel joined in a deed executed by Ellen Colton, et al., to the Lone Coal and Iron Co. (Ex. D) attempting to convey 48,000 acres of land. All the above conveyances were made during the administration of the said Mary Francis Sherwood Hopkins, and were signed individually and without an order or confirmation of the Probate Court, as shown on the face of the deeds.

That on the 26th day of August, 1881, the letters of administration of the said Mary Francis Sher-

wood Hopkins were revoked, and Moses Hopkins applied for letters and was appointed administrator. The decree shows on its face that neither of these parties furnished the clerk of the Court with the names and addresses of the heirs as required by law, paragraphs 14-15-16 and 17 of the complaint.

That a purported decree was signed by the Court November 1, 1883, and prior thereto Moses Hopkins filed a purported report in the Probate Court, and petition for distribution, in which he failed to report all the assets of the estate in his hands but reported only a fractional part of the assets. In fact the property returned to the Court was not in existence at the time. (Paragraph 19, Subsec. F.) Paragraph 19, subsection G sets out \$24,940,592.29 of the personal property unreported, unaccounted for and undistributed as shown by the inventory filed in the Probate Court on or about May 5, 1878, by A. J. Briant, R. B. Redding and E. J. Miller, Jr., appraisers of the estate appointed by the Court as alleged in complaint. (Paragraph 19, Subsec. K.)

Paragraph 19, subsection M, alleges part of the scheme and fraud relied on by the plaintiffs.

That in the early eighties some of the relatives learned of the death of their relative Mark Hopkins, and communicated with Moses Hopkins, and were advised that Mark Hopkins had died and left a wife and nine children and had left a will. This information misled the heirs and lulled them to a state of quiescence. (Paragraphs 21 and 22.)

While some of the heirs knew of the death of Mark Hopkins, owing to the fact that the records were destroyed in the Court where the estate was administered, none of them discovered the facts constituting the frauds and concealment of the facts until 1945. (Paragraph 26 of Complaint.)

The heirs lived three thousand miles from the scene of action. (Paragraph 23.)

Mary Francis represented herself to be the wife and Samuel to be the brother of Mark Hopkins which the complaint alleges is not true. (Paragraph 19, Subsec. E and Paragraph 24.)

Mary Francis by the terms of the decree received all of the real estate and three-fourths of the assets of the estate. (Complaint Ex. A.) If she was the wife of Mark Hopkins, she was only entitled to one-half.

It is further alleged in the complaint as amended that Moses Hopkins, who administered the estate, had been convicted of an infamous crime, to-wit, grand larceny. (Complaint Paragraph 16.)

- 
1. **THE COURT ERRED IN ADMITTING OVER PLAINTIFFS' OBJECTION THE AFFIDAVIT OF ROYAL E. HANDLOS AND EXHIBITS THERETO ATTACHED.**

#### **FEDERAL RULES OF CIVIL PROCEDURE.**

Limitations and laches under the rules of the Court in force when this action was commenced and when the motion was made and decided were matters of



defense and had to be pleaded unless it appeared on the face of the complaint.

*McConville v. District of Columbia*, 26 Fed. Supp. 295.

“Motions to dismiss under the Federal rules is essentially the same as demurrer in early equity practice and such actions should be overruled where it brought in matters not alleged or appearing in the complaint.”

Citing:

*Moo v. Distilling Co.*, 49 Fed. Supp. 295.

*Halmberg v. Hanaford*, 28 Fed. Supp. 216.

“The defense of laches and limitations should be raised by an answer affirmatively setting forth the claims in these respects, rather than by motion to dismiss.”

Rule 12 of the Federal rules of civil procedure, had not been amended when the present action was commenced and motion made, submitted and decided. The amended rules applying to the admission of the affidavit and documents in question and under which the Court admitted the evidence were not in force and effect when the evidence was admitted over the objections of the plaintiffs, and the case decided. The amended rules were not submitted to Congress for ratification until the convening of the 80th Congress, January, 1948, and did not become effective until the close of the session, or six months after ratification.

See Act of June 19, 1934, Chap. 651, U.S.C. Title 28, 723b, 723c.



## SPEAKING MOTIONS AND DEMURRERS.

This appeal is based on the question of laches, the affidavit and exhibits thereto attached, dehors and controverts the facts alleged in the complaint, and might be termed a speaking motion, if there is such a thing in civil procedure, and is never held good.

*Gallup v. Coldwell*, 120 Fed. (2d) 90.

“Speaking demurrer is one which in order to sustain itself, requires the aid of a fact not appearing on the face of the pleadings objected to, or in other words, which alleges or assumes the existence of a fact not already pleaded, and which constitute the ground of objection.”

*Mortensen v. Frederickson Bros.*, 180 N.W. 977,  
1 Syl.

“A demurrer raises only questions appearing from the face of the petition, and cannot be treated as a speaking demurrer, that is, a demurrer which introduces some new facts or averments, which is necessary to support the demurrer and which does not appear distinctly upon the face of the petition. A demurrer to a petition admits the verity of the facts well pleaded.”

*United States v. Forbes*, 259 Fed. 585-593.

“A demurrer which sets up a ground dehors the record, or a ground which, to be sustained, requires reference to facts not appearing upon the face of the pleadings thus attacked, is said to be a speaking demurrer, and is never held good.”

*Brick Co. v. Gentry*, 132 S.E. 800-804.

“A demurrer can be sustained, and it is only appropriate when the defects or objections appear on the face of the pleadings, as it is not the province of a demurrer to state objections not apparent on the face of the pleadings to which it is directed.

A speaking demurrer, as styled by the books, is one which invokes the aid of a fact, not appearing on the face of the complaint, in order to sustain itself, and is condemned, both by common law and by code system of pleadings.”

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## 2. THE COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS.

In that the Court failed to find any facts germane to the facts alleged in the complaint upon which to base its conclusions of law.

*Carrell v. Hotel Co.*, 149 Fed. (2d) 404.

“A complaint should not be dismissed unless it appears certain the plaintiff is not entitled to relief under any state of facts which could be proved regardless how likely it may seem plaintiff will be able to prove his case. Ordinarily on a defendant's motion to dismiss court may consider only allegations of complaint which alone are taken as true.”

It is frankly admitted that “the complaint does not allege that the ancestors *knew* the facts during their lifetime, or that they had *knowledge* of the falsity of the true facts,” and that intrinsic fraud

does not avail plaintiffs, as stated by Judge Lemmon in his order of dismissal. Neither of these findings come within the purview of the facts alleged in the complaint. On the other hand the complaint alleges **THEY DID NOT KNOW "THE FACTS, AND PLAINTIFFS RELY ON EXTRINSIC FRAUD,** and the facts alleged in the complaint do constitute extrinsic fraud. The complaint does allege facts, which are uncontroverted, showing that the purported appointment of Moses Hopkins as administrator was void by reason of his having been previously convicted of an infamous crime.

Also that the deeds set out in the complaint (Ex. B, C, D) and the purported decree of distribution set out in the complaint (Ex. A) are void on their face, and a void order or judgment may be attacked at any time or place.

Also, the complaint on its face shows that the purported decree of distribution is only a partial distribution of the estate of Mark Hopkins, had upon the petition of the purported administrator and such decree was void upon its face, for the reason that the law at the date of the purported distribution did not permit the administrator to petition for partial distribution. A void order, judgment or document may be attacked at any time and any place. The doctrine of laches does not apply to an action to establish the invalidity of such order, judgment or document, all of which is hereinafter more fully shown.

**STATEMENT OF LAW.**

It is a well settled principal of law, that laches does not run against a void instrument, or one secured where the Court does not have the power to render same, and in any event, does not begin to run until the parties have full knowledge of the facts, and if fraud is concealed so as not to come to the knowledge of the party injured. The allegations in the complaint fully meet these requirements.

Laches is a defense that should be pleaded, unless the complaint shows laches on its face.

Time alone does not constitute laches, there must be negligence or inactivity on the part of the plaintiff after full knowledge of the facts.

The Court in its supplemental order drew a very fine distinction in passing on paragraph 19, subsection M, page 13, line 20, and paragraph 18, in which plaintiffs allege that the plaintiffs or their ancestors never knew of the fraudulent acts of said administrator. The Court says: "That is not an allegation that they did not discover it."

Webster gives the meaning of the word "never" as, not ever: at any time: in no degree: not at all: never more: at no future time. The plaintiffs meant just what they said, the plaintiffs' ancestors never knew about the fraud, and according to the allegations in the complaint in paragraph 19, subsection M, page 13, and the findings of facts in Court's order dismissing the case, the plaintiffs never discovered the fraud until 1945, as alleged.



THE DOCTRINE OF LACHES HAS NO APPLICATION TO THE FACTS ALLEGED IN THE COMPLAINT.

The Court in its order dismissing the action states: "64 years elapsed between the entry of the decree of distribution attacked herein and the commencement of this action. The records in the probate proceedings were destroyed in the San Francisco fire in 1906." These facts appear in the complaint.

"Memories of living witnesses are dimmed through the passage of time and the property here involved has passed to other hands. Under these circumstances, plaintiffs must allege facts which negative laches. Plaintiffs allege discovery by them of the facts first in 1945." There is no averment as to whether their ancestors or any of them knew the facts during their lifetimes. If an ancestor's right was barred it did not revive. It is not alleged that none of the relatives of the deceased had knowledge of the falsity or of the true facts.

The foregoing facts except those alleging that the records were destroyed by fire in 1906 which is alleged in paragraphs 18 and 29 of the complaint are not alleged in the complaint and there is no allegation in the complaint from which such an inference can be drawn.

It is apparent therefrom that the Court bases its finding of laches on the ground that 64 years elapsed between the entry of the decree of distribution attacked herein and the commencement of this action.



The finding of the Court that 64 years has elapsed is not sufficient to sustain a finding of laches. The mere lapse of time does not constitute laches. Full knowledge of all the facts concurring with a delay for unreasonable length of time are the essential elements of the defense of laches, and laches does not begin to run until knowledge is shown to exist.

*Arles v. Vehalam Coal Co.*, 96 Pac. 528, 535,  
52 Oregon 70.

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## RESTATEMENT OF THE LAW OF RESTITUTION ADOPTED BY THE AMERICAN LAW INSTITUTE, ON THE SUBJECT OF LACHES.

Chapter 8, Section 148, commencing on page 589, subsection 1, treats this subject fully, and is in accord with all the authorities herein cited on the subject of laches.

*Briggs v. Buzzall*, 204 N.W. 548, 549, 164 Minn. 116.

“Inactivity when it is not blamable, is not laches. No one can be charged with negligence in the assertion of his rights as will bar one from obtaining equitable relief. The pith of the doctrine of laches is unreasonable delay in enforcing a *known right*.” (Emphasis ours.)

*Kessler and Co. v. Ensley Co.*, 129 Fed. 307.  
“Inactivity when it is not blamable is not laches. No one can be charged with negligence in the assertion of his rights *unless he knew them*. There is no such thing as acquiescence in a wrong, un-

*less there is notice or knowledge of that wrong.”*  
(Emphasis ours.)

*Giearach v. Ruff*, 164 A. 465, 468, 112 N. J.  
Equity 296.

“Laches does not exist where one is ignorant of  
his own culpable negligence.”

In

*Standard Oil of Colorado v. Standard Oil Com-  
pany*, 72 Fed. (2d) 524, 527,

the Court said:

“Laches cannot be imputed to one who has been  
justifiably ignorant of facts creating his cause  
of action.”

*Curl v. Vance*, 181 S. E. 412, 416, 116 W. Va.  
419.

“Lapse of time alone does not constitute laches.”

*In re Braver*, 51 Fed. (2d) 123, 125;

*Fidelity and Deposit Co. of Maryland v. Farm-  
ers Bank of Bates County*, 44 Fed. (2d) 11,  
19;

*McGuire v. Hibernia Savings and Loan Assn.*,  
23 Cal. (2d) 719, 146 Pac. (2d) 673, 681.

“Laches does not result from mere passage of  
time.”

*McGuire v. Hibernia Savings and Loan Assn.*,  
23 Cal. (2d) 719, 146 Pac. (2d) 673, 681,

citing

*Toomey v. Toomey*, 13 Cal. (2d) 317, 89 Pac.  
(2d) 634.

*Williams v. Stillwell*, 217 Cal. 489, 19 Pac. (2d) 773;

*Clarke v. Walker*, 25 Ten. App. 78, 150 S.W. (2d) 1082;

*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

“The fact determination of the controversy involves an investigation of rights originating many years past does not render the claim stale.”

10 *Cal. Jur.* 528, Sec. 66, says:

“One of the principal factors in determining laches is acquiescence. But acquiescence, to be significant must be based on knowledge; that is to say—a full knowledge of the facts. Acquiescence to constitute laches, must be with the knowledge of the wrongful acts themselves and of their injurious consequences, it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity.”

*Broderick's Will*, 83 U. S. 503:

“If fraud is kept concealed so as not to come to the party injured he will not be charged with laches.”

*Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077:

“Though the conduct of a trustee amounted to a repudiation of the trust, such repudiation cannot set in motion the statute of limitations, nor raise the bar of laches, unless it was unequivocally brought to the knowledge of the beneficiary.”

## APPOINTMENT OF MOSES HOPKINS VOID.

In the appointment of Moses Hopkins, administrator, the Court exceeded its jurisdiction.

This principle of law has been upheld by the text writers, the Federal, and State Courts that have a statute similar to Section 1359, Code of Civil Procedure of California in effect in 1878 and in force at the time of the purported appointment of Moses Hopkins as administrator and is now Sections 401 and 420 of the Probate Code of California. Section 1369, Code of Civil Procedure, 1878 and 1881—at the time of the appointment of Moses Hopkins as such administrator read as follows:

“Who are incompetent to act as Administrators.

1. No person is competent or entitled to serve as administrator or administratrix, who is under the age of majority.

2. Not a bona fide resident of the state.

3. Convicted of an infamous crime.

4. Adjudged by the Court incompetent to execute the duties by reason of drunkenness, improvidence, or want of understanding or integrity.”

North Carolina has a similar statute as follows (Chapter 28, Section 8, Volume 2, North Carolina Code):

“Administration.

Disqualification enumerated. The clerk shall not issue letter of administration or letters testamentary to any person who, at the time of appearing to qualify

1. Is under the age of 21 years.
2. Is a nonresident of the state; but a non-resident may qualify as Executor.
3. Has been convicted of a felony.
4. Is adjudged by the clerk to be incompetent, to execute the duties of the Trust.
5. Fails to take oath or give bond.
6. Has renounced his right to qualify.

Chapter No. 14, Section No. 8, page 644. Larceny of horses or mules. If any person shall steal any horse, mare, gelding, or mule, he shall suffer imprisonment at hard labor for not less than one or more than twenty years at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under § 14-82."

The complaint alleges that the decree is void, and that the appointment of Moses Hopkins administrator is void by reason of his having been convicted of an infamous crime, to-wit, grand larceny.

*Freeman on Judgments*, 4th ed., Sec. 117, says:

"A void judgment is, in legal effect no judgment, by it no rights are diverted, from it no rights can be obtained, worthless in itself, all proceedings founded on it are equally worthless, it neither bars or binds anyone, all acts performed under it and all claims growing out of it are void."

Citing

*Kellan Estate*, 63 A.L.R. at page 105.



In *American Jur.*, Vol. 21, page 439, it is said:

“Although the conclusive effect of a judgment of probate and other Courts exercising similar powers upon all matters within their jurisdiction is generally maintained in the several states, yet if a Probate Court having jurisdiction over certain subject matter clearly exceeds its powers, or does acts prohibited by law, its decree may be avoided in a collateral proceeding as well as by an appeal”.

At page 460, Sec. 128:

“In case where the Court granting letters of administration has no jurisdiction the courts have generally held the acts done by such administrator, absolutely void, **IRRESPECTIVE OF LAPSE OF TIME**”.

At page 451:

“In some jurisdictions, the view prevails that the appointment of an ineligible person as administrator is void, and in consequence his acts in an official capacity are also void.”

Citing 14 A.L.R. 622.

In *Scott v. McNeal*, 154 U. S. 34, the Court said:

“An appointment of an administrator of a living person though he has been absent 7 years and presumed dead is void. Because the court had no authority to make the appointment.”

At page 45:

“Taking property under such circumstances was without due process of law, in violation of the 14th amendment of the United States Constitution.”

At page 50:

“In a case decided in the District Court of the United States for the Southern District of New York, in 1880, above cited, Judge Chote, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the Surrogate after judicially determining that he was dead, were null and void as against him, that the payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the 14th amendment of the United States constitution.”

In *Knor v. Nobles*, 28 N. W. Supp. 355, 27 N. Y. Supp. 206 an action to set aside an attempted sale made by the administratrix of her husband's estate, the Court said:

“The main question involved upon this appeal, is whether letters of administration issued by the Surrogate to a minor are or are not void.

“The Statute expressly prohibits the granting of letters to a person convicted of an infamous crime, or to one incapable of making a contract, or to a person under the age of 21 years. Can it be said that the Surrogate by his ipse dixit, can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that a judicial officer can by his mere will override the express prohibition of the statute.”

“The right of the Surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void. A decree granting letters of administration to an infant is void, and may be attacked on that ground in a collateral proceedings.

“It seems therefore, reasonably clear that the appointment by the Surrogate of the plaintiff was void, and that the contract, as far as the plaintiff attempting to bind the estate of her husband was also void. But it is a familiar principle that a person attempting to enter into a contract in a representative capacity having no authority to enter into such contract in such capacity, is bound individually.” (Citing authorities.)

In *Continental Trust Co. v. Noble*, 30 N. Y. Supp. 994, the Court said:

“Since the decision of the general terms of this Court in *Knox v. Noble*, in which the validity of the appointment of the intestate’s widow as administratrix was in question, it is settled that the act of the Surrogate in issuing letters to the widow was void, as she was then a minor, and that any contract made by her as administratrix, so far as it attempted to bind the estate of her husband, was also void.

“The letters that the Surrogate Court issued which attempted to appoint testator’s widow as administratrix being void, there was no representative of the estate, with whom the defendant could deal, or make any contract that would bind

the estate. The bill of sale that he received from the widow was therefore an absolute nullity, so far as the estate was concerned; and the plaintiff, having been duly appointed administrator and being in position to enforce the right and obligations of the estate, is clearly entitled to require the defendant, as surviving partner to account for the co-partnership property in his hands."

*In re Martin Estate*, 31 Cal. App. (2d) 680, 88 Pac. (2d) 755: In this case, the heirs of Martin brought suit to recover an estate that had been ordered by the Court escheated to the State. The Court said that the Probate Court had exceeded its jurisdiction, and that the decree was void. The Court further stated:

"It is our opinion that \* \* \* the Court had no power or jurisdiction to distribute the estate to the State of California. Such a decree, in excess of jurisdiction, is void. 'Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting and hence, the judicial power is not in fact lawfully invoked.' " Citing 15 C. J. p. 729, par. 24.

In *Shipman v. Butterfield*, 47 Mich 487, 11 N. W. 283, it was held that an appointment of an administrator prohibited by statute is void, and may be set aside as a cloud on the title.



In *Hong v. Primean*, 98 Mich. 91, 57 N.W. 25, where a son named in the will as executor had been convicted in New York of the crime of forgery in the first degree, which was punishable by imprisonment in the State prison, he was a felon within the statute disqualifying a felon from acting as executor, and hence was ineligible to act as such.

In the *Estate of Agoure*, 165 Cal. 142, 132 Pac. 587, the widow of the deceased had applied for letters of administration. A creditor interposed with a contest and petition for letters. The petition charged the widow with having entered into a conspiracy to murder her husband. The Court said that the petitioner knew or should have known, that Section 1409 of the Civil Code declares that "no person who has been convicted of murder of the deceased shall be entitled to succeed to any portion of his estate" and that Section 1350 of the Code of Civil Procedure declares that no person is competent to serve as executor or administrator who has been convicted of an infamous crime. The Court held that the petition was without merit.

The question of the validity of the acts of an administrator arises in two classes of cases: those in which the appointment is absolutely void, in which case the acts of the administrator are a nullity, forming one class; and cases wherein the appointment was merely voidable, in which case acts done in good faith prior to the revocation of, and pursuant to the power granted by the letters, have, in gen-



eral, been considered valid and binding upon the estate, forming the second class. See Appointment Void.

*Carr v. Illinois C. R. Co.*, 43 L.R.A. (N.S.) 634-635.

Where the Court has no jurisdiction, its proceedings are absolutely void.

*State v. Richmond*, 26 N.H. 239;

*Tebbetts v. Tilton*, 31 N.H. 273;

*Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248;

*Morgan v. Dodge*, 44 N.H. 255, 82 Am. Dec. 313.

The power of a Court to grant letters of administration in any case, will depend upon the facts as they existed at the time the letters were granted; and if the Court had not the power to grant letters of administration, none of the proceedings, in the course of the administration, will have any validity in favor of any person on the ground that such person was ignorant of the want of power in the Court to grant the letters of administration.

*Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643.

In *Hinkle v. Eichelberger*, 2 Pa. 483, the Court stated that where an administration is originally void, all acts done under it are void.

The principles of law in the above cases apply to the case at bar. If the administrator Moses Hopkins was not eligible by reason of the allegations alleged in the amended complaint, the Court had no authority to appoint him under the statute, and the Court did

not acquire jurisdiction of the person or the property, and could not by any order, vest title in the administrator, and did not by any order, invest him with the character or powers of an administrator.

The Court further states in its opinion and order dismissing this action, "There is no averment as to whether their ancestors or any of them knew the facts during their lifetime. If an ancestor's right was barred it did not revive. It is not alleged that none of the relatives of the decedent living at the time of the administration of the estate had knowledge of the falsity or of the true facts." Appellants concede that if plaintiffs' ancestors' right was barred it does not revive; "and that it is not alleged in the complaint that none of the relatives of the deceased had knowledge of the falsity or of the true facts." If any of the relatives of the decedent living at the time of the administration of the estate had knowledge of the falsity or of the true facts, then this action would not have been commenced. On the contrary, however, it is alleged in the complaint who the ancestors of the plaintiffs were (Par. 14, page 4 of the complaint); "That at the time of the filing by Mary Francis Hopkins of her application for letters of administration said applicant well knew the names and addresses of the true and lawful heirs of said decedent; that said applicant wilfully, knowingly, and with intent to defraud said lawful heirs and to deceive the honorable Superior Court concealed from said Court and from the clerk thereof the names and addresses of said brothers and sisters of said Mark

Hopkins, except only Moses Hopkins; that by reason of said fraud of said applicant the clerk of said Court failed to mail to said heirs, except Moses Hopkins, notice of said hearing or notice of the time and place of said hearing, and that the said heirs other than Moses Hopkins, received no notice thereof, either directly or indirectly, and said heirs never knew of said hearing.” (Par. 15, pages 4 and 5 of the Complaint.)

(Par. 16, page 5 of the Complaint):

“It is alleged in the complaint that thereafter the purported letters of administration issued to Mary Francis Sherwood Hopkins were revoked on or about the 26th day of August, 1881, and that immediately thereafter Moses Hopkins applied for letters of administration in said Court and was granted purported letters of administration.”

(Par. 17, page 5):

“It is further alleged that at the time of filing his application for letters Moses Hopkins well knew the names and addresses of his four brothers and three sisters named in Par. 14, page 4 of the complaint. But knowingly and wilfully, and with intent to defraud and deceive concealed from the court and from the clerk thereof the names and addresses of said legal heirs; that by reason of said fraud of said applicant upon the court and clerk and said heirs, the clerk of said court failed to mail to said heirs notice of said hearing or the time and place of said hearing, and the said heirs received no notice thereof, directly or indirectly and never knew of said hearing

and that no notice was given to them as required by law."

(Par. 18, page 6):

"The complaint further alleges that pursuant to said purported letters of administration, Moses Hopkins administered said estate and applied to said court for a decree of settlement of account and distribution of said estate, that plaintiffs and other legal heirs of the estate of Mark Hopkins, or their ancestors did not receive, and none of them did receive any notice of said account and final distribution, or of the time and place of hearing thereof, as is shown on the face of the decree; and never knew of said hearing of said account and petition for distribution and never knew that said purported decree of distribution had been ordered or made or entered."

(Par. 19, commencing with line 20, p. 13, down to and including the word "Administrator" in line 26):

"That at and during the whole period of probate of said estate the brothers and sisters, the heirs of the deceased other than Moses Hopkins, were not residents of the State of California, and were absent therefrom, and that none of them had any notice or knowledge and never knew of the aforesaid false and fraudulent acts of said administrator."

(Par. 22, pages 14 and 15):

"It is further alleged that in the early eighties one Zebedee Russell, a relative of Mark Hopkins, had information that Mark Hopkins had died, and



on receiving such information said relative wrote to Moses Hopkins requesting information as to the death of Mark Hopkins and as to his estate; that said Zebedee Russell received a reply from said Moses Hopkins that he had willed all of his estate to him, the said Moses Hopkins.”

“That said information coming from Moses Hopkins who occupied a fiduciary relation with said heirs was by them believed; that said heirs had no occasion even to suspect that the statements contained in said letters were not true as to the wife and nine children, and had died leaving a will, believed and relied on said statements and were lulled to sleep and abandoned the idea of making further investigation of said estate until years later when they discovered said statements were false and made for the purpose of deceiving the heirs at law, and the heirs were thereby deceived. That in 1945 upon discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes, fraud, and misrepresentations by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to said estate.”

(Par. 26, p. 16) :

“That Plaintiffs are informed, believe and allege on information and belief that the said Mary Frances Sherwood-Hopkins was never married to the late Mark Hopkins and was not his wife; but as the Plaintiffs are informed, believe and allege on information and belief, was the housekeeper in the home of Mark Hopkins and his kindred in North Carolina. That in order to perpetrate the



scheme to defraud the legal heirs of Mark Hopkins, to-wit, brothers and sisters in North Carolina, Moses Hopkins entered into the scheme and an agreement with the said Mary Frances Sherwood-Hopkins to the effect that he would give her three-fourths of said estate. That Mary Frances Sherwood-Hopkins did aid and abet Moses Hopkins in said fraudulent scheme and entered into the said unlawful agreement upon which the decree of distribution of the Court was based, as aforesaid, by suppressing and concealing from the Court the facts relative to the heirship and rights of the heirs of Mark Hopkins; that by reason of the said acts of Moses Hopkins and Mary Frances Sherwood-Hopkins, a fraud was practiced upon the Court and upon the Plaintiffs and their ancestors. These facts were not discovered by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them until September, 1945."

(Note: This paragraph also rebuts the findings in the Court's memorandum and order of June 17, 1948.)

(Par. 28, p. 17):

"That the said fraudulent acts of Mary Frances Sherwood-Hopkins in fraudulently representing herself to be the wife of the said Mark Hopkins were not discovered by the Plaintiffs or their predecessors or by any of them until 1945, when Plaintiffs discovered that she was only the house-keeper in the home of Mark Hopkins."

(Par. 29, p. 17, beginning with line 43):

"That by chance in August in 1945, the Plaintiffs after long research discovered the deed, above re-

ferred to, recorded in the County of Sacramento from Mary Frances Sherwood, Samuel and Moses Hopkins, to Huntington, et al., that threw some light on the estate, and in 1945, a deed was discovered in Stockton, San Joaquin County, with other facts pertaining to said estate, and in 1945 the Plaintiffs discovered in Kern County other information pertaining to said estate, and a purported copy of the inventory filed in said estate was discovered by plaintiffs in the Hall of History in 1947.”

The Court in his order of dismissal further states:

“It is also very questionable whether there is a sufficient explanation why the facts could not have been discovered by either the ancestors or plaintiffs during the long interval.”

The Court apparently did not base its order of dismissal upon this ground, as it did not hold that there was not a sufficient explanation why the facts could not have been discovered by either the ancestors or plaintiffs during this long interval. However, the complaint does give an explanation why the facts were not and could not have been discovered by either the ancestors or plaintiffs prior to 1945.

(See Pars. 22, 23 and 29 of the Complaint.)

Investigation Prevented or Difficult—Vol. 12, *Cal. Jur.*, p. 762, Sec. 36.

“A party may be excused from investigation where he is prevented, by false and fraudulent representations as to material facts, from seeking the information which he does not possess,

and which, but for such misrepresentations, he might obtain. And although an examination is made, relief will still be afforded if means are used to prevent a complete investigation. Where, for example, one is induced to sign an instrument by false statements as to its contents, made with intent to mislead and to prevent him from making an examination of its provisions, it is no answer to say that a higher degree of care would have enabled him to escape its effect. And where, by artifice, a vendor prevents the purchaser's investigation from being as full as he desires to make it, relief may be awarded. Similarly, a seller of chattels is not at liberty to hinder or obstruct the purchaser in his attempts to find out defects or blemishes, although he may be under no obligation to point them out. A grantee is not permitted, however, to plead ignorance of the covenants of a deed delivered to him, after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants, where there is no evidence that the grantor in any way prevented a personal inspection of the contents of the deed."

"Investigation may be excused also where distance from the object of the transaction, or some similar cause, renders examination extremely difficult. This rule, however, is not applied indiscriminately, and the fact that property is at a distance does not always excuse an investigation."

Circumstances Excusing Investigation—Vol. 12, *Cal. Jur.*, Sec. 34, page 758:

“ ‘Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.’ The party making the representation cannot escape responsibility by showing that the other party might have ascertained that such representation was untrue, or had no right to believe it. Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty rests upon him to employ such means of knowledge, even though by reason thereof, in the absence of any representation at all, a constructive notice would be inferred. The doctrine of constructive notice does not apply where there has been such a representation of fact. If the representation is of a character to induce action and does induce it, that is enough. It matters not that a person misled may be, in some loose sense, negligent, for it is said not to be just that a man who deceives another should be permitted to say to him. ‘You ought not to believe or trust me,’ or ‘You are yourself guilty of negligence’.”

In its order of April 27, 1948, the Court states:

“The averments of intrinsic fraud do not avail plaintiffs.”

Plaintiffs do not rely upon intrinsic fraud.



Plaintiffs in their complaint make averments that clearly show that the fraud committed upon the Court and heirs of Mark Hopkins is not intrinsic in its nature but comes well within the law defining *Extrinsic Fraud*.

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## THE DECREE THAT IS MADE A PART OF THE COMPLAINT EX. A, PAGE 36, IS VOID

In that Mary Frances Sherwood-Hopkins in filing application for letters knew the names and addresses of the brothers and sisters of the deceased, and failed to disclose them to the Court or the clerk thereof as required by law—wilfully, knowingly, with intent to defraud the lawful heir and to deceive the Court, as alleged in the Complaint, Paragraph 15, page 4 of Complaint, that Moses Hopkins in filing his petition for letters, well knew the names and addresses of his brothers and sisters and failed to disclose them to the Court or the clerk thereof and by reason thereof the clerk failed to notify said heirs. That said acts were done or omitted with intent to conceal the facts and deceive and defraud the Court and the heirs of Mark Hopkins as alleged in Paragraph 17, page 5 of the Complaint.

That said facts are shown on the face of the decree in that it is stated in paragraph 3 of the decree: "That Mary Francis Sherwood-Hopkins is the only person interested in said estate except the administrator."



The failure of the administratrix and the administrator to furnish the Court or the clerk the names and addresses of the heirs was extrinsic fraud upon the Court and the heir, which is shown on the face of the decree in which it stated:

“And Mrs. Mary Francis Sherwood-Hopkins the only person interested in said estate except said administrator having filed her consent in writing that said account may be settled and allowed.”  
(See Complaint, page 36.)

Which deprived the Court of its jurisdictions and rendered the appointment and decree void.

*Hill v. Laub*, 116 Cal. 359.

*Duncan v. Superior Court*, 149 Cal. 98.

“In 1878 it was necessary for the petitioner to give the names and addresses of all the heirs, if known and file character and estimated value of all the property to give the Court jurisdiction, then it became the duty of the clerk to notify all the heirs.”

*Pomeroy's Equity Jur.*, Vol. 2, page 1835,  
Sec. 886.

“Where a party makes a statement which is untrue, and has at the time an actual positive knowledge of its untruth, and the necessarily resulting intent to deceive, this is the most direct, and in some respects the highest form of fraud.”

## RESTATEMENT OF LAW ON JUDGMENTS.

Chap. 2-“f”, page 39.

“Opportunity to be heard, even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void, if he was denied all opportunity to be heard, notice to a defendant of the claim which is being made against him is of no value to him if he is denied an opportunity to defend the claim.”

Sec. 142, Chap. 8-“c”, page 573.

“If the recipient has been fraudulent or guilty of duress not only is a defense of change of circumstances barred by the fact that his conduct was tortious, but also because of his knowledge of the facts from which he had notice of the rights of the claimants to the subject matter.”

The defendants having received the property described in the complaint with record notice of the facts alleged in the complaint are bound thereby.

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## THE DECREE IS VOID BY REASON OF THE FRAUD PRACTICED UPON THE COURT AND THE HEIRS.

*Larabee v. Tracy*, 39 Cal. App. (2d) 593.

“After holding that the facts that the party was misled and kept away from court, and no notice was given other than by publication,” the Court said, at page 599: “In all these cases and many others which have been examined, relief has been

granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that the party has been prevented from presenting his case to the Court. This definition has become the well recognized standard definition of extrinsic fraud."

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### EXTRINSIC FRAUD.

#### THE COMPLAINT ALLEGES FACTS ESTABLISHING EXTRINSIC FRAUD.

IT ALLEGES THAT MOSES HOPKINS, THE PURPORTED ADMINISTRATOR, IN FILING HIS REPORT, REPORTED ONLY A MINOR PORTION OF THE REAL AND PERSONAL PROPERTY OF THE ESTATE, BUT ON THE OTHER HAND REPORTED PROPERTY THAT WAS NOT IN EXISTENCE AT THE TIME, AS ALLEGED IN PARAGRAPH 19, subsections F and G, pages 7, 8, 9, 10 of the Complaint and failed to report millions of dollars belonging to the estate. In his possession at the time of filing of his report as alleged in complaint. This constituted extrinsic fraud.

*Weyant v. Utah Savings and Trust Co.*, 182 Pac. 189.

See

*Goodrich v. Ferris*, 145 Fed. 844.

This is a case where a husband left his wife and children and married another woman, died, the purported wife was appointed administratrix and ad-

ministered on the estate. The wife and children brought suit to set it aside and upon the bond. At page 199 the Court said:

“The administratrix so far as the respondent is concerned, acted directly contrary to and in the teeth of duty imposed by law and by the bond that is sued on. It was the duty of the administratrix under the law, to publish proper notice, so as to appraise the heirs, and all others interested in the estate of the true condition, and when she failed to do that she utterly failed to faithfully execute the duties of the trust according to law, nor did she administer the estate for the use and benefit of the heirs of the deceased as she was bound to do.

Nor did the wrong committed by her occur after the decree of distribution nor when acting in a capacity other than that of administratrix, but while acting in said capacity.

In the probate proceedings herein questioned, however, the administratrix not only failed to publish proper notice, but she utterly failed to make and return a true and complete inventory of the property belonging to the estate, she converted millions to her own use without reporting it to the court and without disclosing its existence.

That act alone constituted an insufferable fraud and manifestly constituted a breach of trust.”

See *Cyc.* Vol. 18, page 1267.

“Moreover all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate.”



*Aldrich v. Barton*, 138 Cal. 220, 71 Pac. 169.

“In this case the plaintiff alleged that the trustee withheld funds and failed to report same to the court. That it was a fraud upon the court and the interested party. The court said the trustee took advantage of the absence of the cestui que trust to present a false and fraudulent petition to the court and have it acted upon without her knowledge, this was a fraud upon the court as well as upon the absent interested party, and this is held to be extrinsic fraud, which prevented the plaintiff from being properly represented at the hearing or from being represented at all.”

*Sohler v. Sohler*, 135 Cal. 323, 62 Pac. 282.

“Respondents, against the sufficiency of the complaint, urged by their demurrer that it is the exclusive province of the court in probate to determine heirship and decree distribution; that the complaint goes no further than to charge intrinsic fraud, in that Paul Reuss succeeded by false and perjured evidence in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment; and that, notwithstanding that the decision was obtained by such evidence, this fact affords no ground for relief in equity. If this were all the complaint discloses, the respondents contention would be undoubtedly sound; for it is the general rule that intrinsic fraud—fraud by which a decree or judgment is obtained by false evidence upon issues within the case—is not such fraud as equity will relieve against; the theory being that the losing litigant has had his day in court, and that, while it must always remain a



misfortune that private causes shall be lost by forsworn testimony, yet stronger than this consideration is that which declares it to be the policy of the law to make an end of litigation, and in the nature of things, there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence had been introduced in its procurement. Therefore it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought—extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of his or her witnesses from attending the trial, and the like. But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate, and all of the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix, merely, it might be argued that she was a disinterested party, having no concern whatsoever in question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as the mother and natural guardian of these plaintiffs her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring.

She was under like obligation to disclose to the court on their behalf, and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of and administered upon the estate through which her children were to derive their property. Such being her position, it is charged that in violation of this duty, and of the rights of her minor children, she connived with her adult son, not an heir to the estate of the deceased, to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here, certainly, is a charge of concealment upon the part of the guardian when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by con-

spiracy with her codefendant, it is asserted, she did not do; and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the case, or from being represented at all.

We conclude, therefore, that the complaint presents a bill for equitable relief. But for what kind of relief? The relief prayed for is that the court in equity should avoid so much of the decree as distributes the property to Paul Reuss, should decree that the plaintiffs are entitled to that property in equal shares, and should distribute it accordingly. The prayer for such relief derives support from the case of *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232. In that case a married woman, the owner of separate property in San Francisco, died while her husband was at sea. Her sister procured letters of administration upon the estate, and sought and obtained distribution upon a petition that her sister had conveyed the property to her in her lifetime by an unrecorded deed which was lost. The appearance of the absent husband was falsely entered by an authorized attorney. The trial court found all these facts, but withheld relief; and this court declared that the plaintiff was entitled to the relief sought, —the setting aside of the decree of distribution."

It is not true that the representations upon which plaintiffs would predicate fraud are alleged to have

been made in the early eighties, \* \* \* It is true that the complaint avers certain letters referred to in paragraphs 21 and 22 received in the early eighties, these letters were false in their statements, and were an element of extrinsic fraud. Conceding for the sake of argument, that these letters were received after the decree became final, and if such be the case, they do not amount to actionable fraud. Nevertheless, they did act as an anaesthetic that lulled the brothers and sisters of Mark Hopkins and their descendants to sleep and caused them to abandon their investigation until later years, when they discovered the written words of Moses Hopkins were false, as alleged in the complaint.

Nevertheless, the fraud committed upon the Court and the ancestors of the plaintiffs by withholding and concealing from the Court the names and addresses of all the brothers and sisters of Mark Hopkins, and the concealment, and failure to report to the Court the major portion of the estate, and the failure to appraise the brothers and sisters of their rights and interest in the estate, is extrinsic fraud of the most vile and repugnant character, and is actionable. This fraud, it is alleged, was committed at the beginning and during the course of the probate proceedings.



THE DECREE WAS ONLY A PARTIAL DISTRIBUTION OF THE ESTATE AND WAS MADE UPON PETITION OF THE PURPORTED ADMINISTRATOR, AND VOID.

The complaint alleges the decree failed to distribute or mention the bulk of the estate in his hands and known to the administrator at the time, and the decree shows on its face that it failed to distribute the cash on hand. In that the cash on hand at the time was \$895,894.01. The decree only distributed \$895,078.01, leaving the sum of \$816.00 undistributed and unaccounted for as shown on the face of the decree, also \$24,940,592.29 personal property undistributed and unaccounted for. [Complaint, pp. 9 and 10.]

Paragraph 19, page 6, Subsection D, page 7 shows that the purported decree *was a decree of partial distribution*, in that it shows on its face that only a part of the estate accounted for was distributed; and that such partial distribution was on the petition of the administrator. That Section 1658 of the Code of Civil Procedure of California in effect at the time of such partial distribution did not authorize an administrator to petition for partial distribution and any order made pursuant to such petition was unauthorized and beyond the jurisdiction of the Court, there being no authority in the statute for the proceedings taken in the Court below, they were unauthorized, and should be set aside—*In re Letellier's Estate*, 74 Cal. 311, 15 Pac. 847.

In *Alcorn et al. v. Buschke*, 133 Cal. 655, 66 Pac. 15, the Court said:



“As to the validity of the decree of distribution no argument is advanced by the respondent’s counsel, or rather argument is expressly declined. But clearly the proceeding, which was on the petition of the administrator for partial distribution was without jurisdiction, and the judgment void. (158 Cal. 396.)”

In *Alcorn v. Gieseke*, 158 Cal. 396, 111 Pac. page 98, at page 101, the Court said:

“It may equally be conceded that the decree of partial distribution was void because the court had no jurisdiction to entertain it by the petition of administrator, the statute only authorizing it on the part of the heirs, devisees or legatees.”

It appearing on the face of the purported decree of distribution (Ex. A, p. 36) that the sum of \$816.00 reported accounted for and in the hands of the administrator, is not distributed by the decree and is not disposed of by the omnibus clause, which omnibus clause only attempts to distribute the unknown property of the estate. The decree left the sum of \$816.00 as shown by the account in the estate and therefore was only a decree for partial distribution and without the jurisdiction of the Court to make distribution on petition of the administrator.

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## THE COURT EXCEEDED ITS JURISDICTION.

In that it attempted to distribute three-quarters of the estate to Mary Francis Sherwood Hopkins, if she was the wife of the deceased, under the law she was

only entitled to one-half. This is shown on the face of the decree.

Under the law existing when the purported distribution was made, a wife was only entitled to one-half of the estate. In the instant case it appears from the decree that the Court attempted to distribute all the real estate and three-quarters of the personal property of the estate to the said Mary Francis Sherwood Hopkins.

Under Section 1658, Code of Civil Procedure, in effect at the time, a wife where there was no issue was entitled to only one-half of the estate. The decree purports to distribute three-fourths of the residue of the estate to the alleged widow. This is clearly in excess of the Court's jurisdiction, there being no law upon which such distribution could be made.

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### VOID DEEDS.

The following deeds are void as alleged in the complaint.

The deed from Moses and Samuel to Mary Francis Sherwood Hopkins (Ex. B) fails to describe the property attempted to be distributed, and was executed while the grantee was acting in a fiduciary capacity, as administratrix, as appears on the face of the deed.

The deed from Mary Francis, Moses and Samuel to Huntington, et al. (Ex. C), was executed without

an order or confirmation of the Probate Court, and while Mary Francis was acting as administratrix, and signed by her individually, and said deed fails to show on its face authority to execute same, as alleged in complaint. And further, the deed on its face shows a cash consideration of one dollar, which was inadequate consideration, and if the Probate Court exercised any authority over said sale, it exceeded its authority in attempting to settle a partnership business. That the deed from Ellen Colton, et al., to the Ione Coal and Iron Co. (Ex. D), in which Mary Francis, Moses and Samuel joined in, was executed while Mary Francis was acting as administratrix and signed by her individually; said deed fails to show on its face authority to execute same as alleged in the Complaint. All the property referred to and described in paragraphs 45 and 50 it is alleged in the complaint was sold without authority of the Court. That the defendants took said purported title with notice of the defects of record, and are not innocent purchasers for value, that said deeds were not executed by all the heirs of Mark Hopkins.

*Rannela v. Rowe*, 145 Fed. 296.

“A warranty deed to lands belonging to the estate of a deceased made by his executor without authority, is ineffectual as against survivors, but where such executor was also a devisee of an interest in the land the deed being in excess of their power as executor passed title to their individual interest by estoppel.”

In this case the executors sold land and executed a warranty deed in their representative capacity, of

the widow of the deceased, owner of the land and under the will she took half interest therein. The deeds were void, as executors' conveyance because no authority to make them had been procured from the Court having jurisdiction but nevertheless operated as conveyance of the widow's individual interest. This results from the doctrine of estoppel.

“A trustee acting within his powers does not render himself liable on his contracts and conveyances; but whenever he exceeds his powers and undertakes to transfer and convey without authority he becomes personally answerable to the grantee on his covenants.”

### Citing

*Morris v. Watson*, 15 Minn. 212;

*Tarver v. Haines*, 55 Ala. 503;

*Allen v. DeWitt*, 3 N. Y. 276-289;

*Brown v. Edson*, 23 Vt. 435.

“In the absence of some power contained in the will, or of authority derived from statute or order of court, neither an executor or administrator has any power whatever to sell the real estate of his deceased; an unauthorized conveyance may be enjoined at the suit of an heir; a deed made by representative without authority is void except to pass his own interest.”

136 Cal. 416, 69 P. 87, 145 Fed. 296.

*Cal. Jur.*, Vol. 11, Sec. 494, page 832.

“Under the present system, no order directing a sale is required but, as under the former provisions, no title passes until the sale is confirmed by the Court. If an executor or administrator

without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs.”

The above deeds were executed in their individual capacity as shown on the face of the deeds, and only pass whatever title they had if any were recorded, and were notice to subsequent purchasers.

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THE DECREE RECOGNIZED MARY FRANCIS AND SAMUEL HOPKINS AS INTERESTED PARTIES AND NOT HEIRS, WHICH IS DENIED BY THE ALLEGATIONS OF THE COMPLAINT; THIS ALSO APPEARS ON THE FACE OF THE COMPLAINT.

The Court exceeded its jurisdiction in distributing property to persons not found to be heirs, but only persons interested in the estate, and not heirs of the deceased. The Court attempted to distribute that portion of the estate described in the purported decree, solely upon an agreement entered into between parties not heirs of the estate.



THAT THE DECREE AND DEED FAIL TO DESCRIBE THE REAL ESTATE ATTEMPTED TO BE DISTRIBUTED, AND RECOGNIZED AND BASED ITS DISTRIBUTION UPON AN AGREEMENT BETWEEN MARY FRANCIS, MOSES AND SAMUEL, AS SHOWN ON THE FACE OF THE DECREE.

(Paragraph 19, Subsec. H of the Complaint.)

*Sheppard v. Pepper*, 133 Cal. 626 at 645.

“A judgment may be so uncertain in its description as to real estate involved as to be void and inoperative.”

*Bates v. Howard*, 105 Cal. 173.

“A decree may be void on account of the uncertainty of its description.”

*Saterstrom v. Click Bros.*, 5 Pac. (2d) 21, 118 Cal. App. 379.

“Deed must contain such description as will enable property to be readily located by reference thereto.”

*Smith v. Cal. Portland Credit Co.*, 25 Pac. (2d) 1013, 134 Cal. App. 630.

“Deed failing to describe land so that it might be located, and furnishes no means by which description could be made more definite held void.”

*Sepulveda v. Apablaza*, 77 Pac. (2d) 526, 25 Cal. App. (2d) 381.

“A deed was void for uncertainty, where it contained no definite or ascertainable description of the property intended to be conveyed.”

While the above citations apply to deeds the same principle applies to judgments or decrees where they attempt to convey title to real estate.

In *Scott v. Woodworth*, 167 Pac. 543, at page 546; 34 Cal. App. 400, the Court said:

“To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description. It is true that the description by boundaries may be ambiguous or indefinite, and still the deed sufficient if it otherwise provides means whereby the description can be made certain and the land identified and located. Where, however, the description is so vague or uncertain that the property cannot be identified and located therefrom, and the writing itself does not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing.”

The propositions above stated are quite elementary, and need the citation of no authorities to confirm them; still we cite the following authorities as em-

bodying a clear elucidation of the principles involved therein:

- Brandon v. Luddy*, 67 Cal. 43, 7 Pac. 33;  
*Best v. Wohlford*, 144 Cal. 737, 78 Pac. 293;  
*Donnelly v. Tregaskis*, 154 Cal. 261, 97 Pac. 421;  
*People v. Lumpke*, 41 Cal. 263;  
*Moss v. Shearer*, 30 Cal. 467, 468;  
*Barker v. Southern R. W. Co.*, 125 N.C. 596, 34 S.E. 701, 74 Am. St. Rep. 658, 660; 2. *Devlin on Deeds*, § 1910;  
 13 *Cyc.* 543;  
*Fletcher v. Superior Court*, 79 Cal. App. 468 at 477.

“The agreement or consent of the parties cannot give the Court the right to adjudicate upon any cause of action or subject matter which the law withholds from its cognizance, and in such cases the order or judgment of the Court is void notwithstanding such consent. Consent may be given of the person but not of the subject matter.”

In the instant case the decree shows on its face that the Court based its distribution of the real estate on the consent of the parties.

See Decree, Ex. A, at page 38 of Complaint.

The complaint alleges that Mark Hopkins at the time of his death owned a one-fourth interest in the Southern Pacific Company, and the Central Pacific Railroad Company, as set out in plaintiffs' fourth and fifth cause of action, paragraphs 55 and 64, pages 29 and 32 of the Complaint.

It is further alleged in paragraph 59, page 30, and paragraph 66, page 32, that the descendants, the brothers and sisters of Mark Hopkins, own seven-eighths of the one-fourth interest.

It is alleged in paragraph 59, page 30, and paragraph 69, as follows:

“Plaintiffs further allege that if said defendant corporation has transferred upon its books any of said stocks and bonds or entered thereon any assignment of the interest of plaintiffs in and to said stocks and bonds, or liquidated any stocks and bonds, such transfer, assignment, or liquidation of said stocks and bonds, or other interest of plaintiffs, was without authority of said heirs or of a court of law and in violation of the legal rights of said plaintiffs and their ancestors.”

On account of the importance of the case, the appellants have gone into the facts and law bearing thereon, on which the Court based its order and judgment in dismissing the case at length, quoting from the Complaint and the citations for the convenience of the Court.

We have covered all the points made by the Court in its order and opinion upon which the Court based its order dismissing appellants' action, and assume that this Honorable Court, in determining this appeal will not go beyond the points upon which the District Court based its order; and that the Court held all other grounds upon which defendants' motions were made, were without merit.

We respectfully submit that the judgment and order dismissing said action on the grounds of laches be reversed, and the District Court be instructed to proceed with the trial of said action.

Dated, August 25, 1948.

BUSICK & BUSICK,  
CHARLES H. SECCOMBE,  
S. J. BENNETT,  
*Attorneys for Appellants.*



No. 11,990

IN THE

United States Court of Appeals  
For the Ninth Circuit

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ESTELLA LATTA, JONES M. GRIFFIN and  
ALWIN CHAMBERS,

*Appellants,*

VS.

WESTERN INVESTMENT COMPANY (a  
corporation), et al.,

*Appellees.*

APPELLANTS' SUPPLEMENTAL BRIEF.

---

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PAUL P. DERRICK



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No. 11,990

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vs.

WESTERN INVESTMENT COMPANY (a  
corporation), et al.,

*Appellees.*

## APPELLANTS' SUPPLEMENTAL BRIEF.

### JURISDICTION OF THE U. S. DISTRICT COURT.

This is a suit of a civil nature in equity for declaratory relief.

Transcript of Record, Para. 10, page 5.

1. *The matters in controversy exceed, exclusive of interest and cost, the value of \$3000.00.*

2. *Diversity of citizenship.*

Transcript of Record, Para. 2, page 3.

**Comment:** Fraud and other reasons giving court jurisdiction.

*Mfg. Co. v. Cotton Mills*, 184 U. S. 290;

*Baker v. Eastman*, 206 Fed. 865;

*Markham, Alien Property Custodian v. Allen*,  
156 Fed. (2d) 653.



### 3. *Fraud.*

“While the case was open and pending, the Probate Court had exclusive jurisdiction of all matters of accounting by administrator. But when time had expired and no appeal could be had, the powers of the equity court were at once available if the decree had been fraudulently obtained.”

*Baker v. Superior Court*, 43 Cal. App. 221 at 224.

“Where the court of equity has jurisdiction over any phase of the case, it will exercise jurisdiction over all phases.”

*Murphy v. Crawley*, 140 Cal. at 145.

### 4. *Property withheld from the court.*

“Where property was withheld from the court, a court of equity will exercise jurisdiction over it.”

*Griffin v. Cody*, 113 U. S. 89;

Transcript of Record, Para. 19, Sub. Secs. “f”, “g”, pages 11 to 15, inclusive.

“Where state Courts have laws permitting suits in equity, the Federal Courts have concurrent jurisdiction especially where there is fraud or concealment of facts.”

*Gains v. Fuentel*, 92 U. S. 1010;

*Sutten v. English*, 246 U. S. 199.

### 5. *Real property withheld from the court.*

Transcript of Record, Exhibit “B”, page 53 et seq.

Deed of Samuel F. Hopkins and Moses Hopkins to Mary Frances Hopkins, dated March 30, 1880, she

then being administratrix, Transcript of Record, Para. 25, page 23.

a. Deed void for lack of description of real estate.

b. Deed purporting to convey property to Mary Frances Hopkins while she was acting in a fiduciary capacity, was a breach of trust and a fraud upon the heirs.

Transcript of Record, Exhibit "C", page 55  
et seq.

a. This deed was executed April 5, 1879, by Mary Frances Sherwood-Hopkins et al. to Collis P. Huntington et al. without an order or confirmation of the court and during the purported administration of Mary Frances Sherwood-Hopkins and signed individually by her.

b. This deed attempted to convey real estate, particularly described, and which Mark Hopkins either owned or in which he had an interest; and also attempted to settle and convey the interest held by Mark Hopkins in a copartnership.

Transcript of Record, Para. 24, page 22.

c. This deed was signed by Mary Frances Sherwood-Hopkins, individually and not in her purported capacity as administratrix.

Transcript of Record, Exhibit "D", page 61  
et seq.

This deed as of date January 16, 1880, attempted to convey to Lone Coal and Iron Company real estate therein described in which Mark Hopkins had a one-fifth interest.

a. This purported conveyance was without order or confirmation of the Probate Court as shown on the face of the deed.

b. M. F. Sherwood-Hopkins signed individually and not in her fiduciary capacity as administratrix and this purported conveyance was a fraud on the court and upon the heirs of Mark Hopkins.

In the Fourth Cause of Action, Transcript of Record, page 40 et seq., and in the Fifth Cause of Action, Transcript of Record, page 43 et seq., the plaintiffs allege that Mark Hopkins at the time of his death owned an interest in the Southern Pacific Company and the Central Pacific Railway Company, and that if said decedents have transferred, assigned or liquidated said interests it was done without the knowledge, consent, or authority of the plaintiffs or their ancestors and without authority of law, and is a fraud upon the court and upon the plaintiffs and their ancestors.

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#### **JURISDICTION OF THE U. S. COURT OF APPEALS.**

The order of the District Court granting motion to dismiss is a final order or judgment.

Transcript of Record, pages 196 to 198.

*Southern Pacific R.R. v. Willett*, 14 Pac. (2d) 526.

In this case the court said the rule is well established in this state from a very early period that a

minute order of the trial court dismissing an action is a final judgment.

California Code of Civil Procedure, Sec. 963.

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions in the district court in all cases save where a direct review may be had in the Supreme Court.”

Judicial Code, Vol. 28, Sec. 225.

The United States Statutes at Large, 51st Congress, Chapter 517, page 826, was an act to establish the Circuit Courts of Appeals, giving them power to review final judgments and orders of the District Courts.

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### **ERRORS.**

1. The District Court erred in admitting affidavit of Handlos. (Appellants' Brief, page 6.)

2. The District Court erred in admitting affidavits and exhibits on motion.

a. Amendment to U. S. Rule 12 not then in effect. (Appellants' Brief, page 7.)

b. The order of dismissal based upon affidavits and exhibits admitted by the District Court was erroneous.

---

### **ISSUES ON THIS APPEAL.**

1. The complaint alleges facts which negative laches.

2. Laches do not apply to void instruments.
3. Laches do not apply to a Decree of Distribution granted by the court in excess of its jurisdiction.
4. Laches do not run against extrinsic fraud upon the court and the interested parties, prior to the full discovery of the facts.

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### ARGUMENTS.

1. Does the complaint allege facts which negative laches?

a. Appellants contend that it does.

The Honorable U. S. District Court finds that it does not. In this finding the court erred. The order of dismissal is not supported by the facts alleged in the complaint.

Appellants' Brief, pages 1, 2, 3; Transcript of Record, Paras. 21, 22, 23, page 20 et seq.; also Para. 29, pages 25 and 26.

b. The District Court erred in its findings that averments of fraud in the complaint constituted INTRINSIC FRAUD.

The fraud alleged by plaintiffs is *extrinsic* in its nature. The plaintiffs do not predicate their cause of action upon *intrinsic* fraud. (Transcript of Record, Para. 19, Sub. Secs. F and G, pages 9 to 15, inc.; also Sub. Sec. M, pages 18 to 20, inc.)



The appellants contend that there were no matters finally determined by the purported Decree of Distribution of the Probate Court.

Transcript of Record, Para. 14, page 6 et seq;  
 Paras. 17, 18 et seq., page 8 et seq.; Para.  
 19, page 9 et seq.;  
 Appellants' Brief, pages 35 to 41, inc.

2. Laches do not apply to void instruments.

a. The complaint raises the issue as to the Decree of Distribution and certain deeds being void.

Appellants' Brief, pages 13 to 15, inc.; pages  
 42 to 45, inc.; pages 48 to 50, inc.

b. This issue must be squarely met and finally determined by the court.

c. The order of dismissal is *silent on these allegations* and by its order of dismissal, the court deprives the plaintiffs of their day in court.

d. In this the court not only erred but violated the constitutional rights of plaintiffs.

Transcript of Record, Para. 20, page 20;  
 Appellants' Brief, pages 18 and 19.

e. The defense of laches is not available to void instruments.

Appellants' Brief, pages 32 to 34, inc.

3. Laches do not apply to a Decree of Distribution granted by the court in excess of its jurisdiction.

a. The complaint alleges that the court appointed as administrator one convicted of an infamous crime.

Appellants' Brief, pages 16 to 23, inc.

b. By reason of such appointment all proceedings thereunder, including the decree, are in excess of jurisdiction and are void.

c. Laches do not cure lack of jurisdiction of court.

d. The order and dismissal not only is silent on this issue, but in effect would determine as valid a Decree of Distribution granted by the Probate Court in excess of its jurisdiction and in violation of the statute of California and the statutes of North Carolina.

Appellants' Brief, page 16.

4. Do laches run against extrinsic fraud upon the court and the interested parties prior to the full discovery of the facts?

Appellants' Brief, pages 13 to 15, inc.

Dated, October 1, 1948.

Respectfully submitted,

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IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

ESTELLA LATTA et al.,

*Appellants,*

vs.

WESTERN INVESTMENT COMPANY et al.,

*Appellees.*

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IN THE

United States  
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For the Ninth Circuit

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ESTELLA LATTA et al.,

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*Appellees.*

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**Brief of Appellees**

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**FOREWORD**

It is almost impossible, within the space permitted by the rules of this Court, for appellees to correct all the many misstatements of essential matters and miscitations in appellants' brief, to call attention to their almost invariable misquotations from authorities, to the many paragraphs, and parts of paragraphs, in their brief purporting to be quotations from decisions which consist of language which either does not appear in the decision, or has been materially altered.\*

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\*Careful check discloses that of the numerous citations of authorities and some 55 purported quotations therefrom in both the original and supplemental briefs of appellants, correct cita-

The preparation and submission to the Court of a helpful reply brief on this appeal has also been rendered difficult by the failure of appellants to comply fully with essential requirements of subparagraphs (a), (b) and (f) of paragraph 2 of Rule 20 of this Court, and their very inadequate compliance with subparagraph (c) thereof. It is also rendered difficult by appellants' scattered assertions in their brief of points having no bearing upon the issue here presented and by repeated statements of what they believe to be the law without supporting authorities.

Appellees have concluded that it would be most helpful to present the case, as made out in the record, with supporting authorities, and in the course of the argument to reply to such matters in appellants' brief as appear germane to the issues.

### STATEMENT OF THE CASE

Mark Hopkins, a resident of California, died intestate on March 29, 1878 (R. 5). He left real and personal property in California. Mary Frances Sherwood Hopkins, as his surviving wife, filed an application with the Superior Court in San Francisco for letters of administration which were issued to her on June 3, 1878 (R. 6). On or about August 26, 1881, Moses Hopkins, a brother of decedent, was substituted as administrator, and continued to act as such until November 1, 1883, when a decree of final distribution was rendered by the late J. V. Coffey, Judge of

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tions were the exception rather than the rule. Only five quotations were found to be correct. Many quotations were of whole cloth (e.g., that on middle of page 33 of appellants' main brief).

the Superior Court (R. 49-53). While the files in the County Clerk's office in San Francisco, including the probate records in the Mark Hopkins estate, had been destroyed in the 1906 fire (R. 101), authentic copies of the decree of final distribution had been recorded in other counties (R. 144-150) and are therefore available.

Estella Latta, Jones M. Griffin and Alwin Chambers, as plaintiffs, filed a complaint in the court below on May 2, 1947 (R. 2-48) alleging that they "appear herein as plaintiffs for themselves and for all other heirs of Mark Hopkins, similarly situated whose names are set forth in Exhibit 'F' " (R. 3). It appears from the complaint itself, however, that none of the three plaintiffs are or were heirs of Mark Hopkins and that none of the persons named in Exhibit "F" (R. 70) are or were heirs of Mark Hopkins. It is only alleged that they are descendants of brothers and sisters of Mark Hopkins, but with no allegation that they succeeded to the estates of their respective ancestors (Par. 14 of Complaint, R. 6).

The complaint asks the court to adjudge:

1. That the plaintiffs and the persons named in Exhibit "F" "are the heirs of Mark Hopkins, deceased" (R. 46);
2. That the decree of distribution rendered in the Estate of Mark Hopkins, deceased, on November 1, 1883, "is null and void" (R. 46);
3. That certain property described in the complaint "remained a part of the estate of Mark Hopkins, undistributed" (R. 46);
4. That if the court finds the decree of distribution valid, it adjudge that certain property did not pass to the

distributees, but that a portion thereof was vested in plaintiffs, subject to administration (R. 47);

5. That the District Court direct the Superior Court to appoint an administrator, *de bonis non*, etc. (R. 47-8; and

6. That the plaintiffs have such other relief as the court deems equitable.

All of the defendants (appellees here) who had been served except defendant Southern Pacific Railroad Company joined in duly serving and filing a Notice of Motion to Dismiss Complaint (R. 82-90). Defendant Southern Pacific Railroad Company separately duly served and filed a Notice of Motion to Dismiss Complaint\* (R. 180-184). With the notice of motion of appellees Jones et al. was served and filed the affidavit of Royal E. Handlos (R. 90) to which were attached various exhibits consisting of certified copies of records of the Superior Court of the State of California in and for the City and County of San Francisco, and of said Superior Court in and for the County of Sacramento (R. 90-179). With the notice of motion of Southern Pacific Railroad Company there was served and filed the affidavit of Roy G. Hillebrand (R. 184-186).

The motions were duly heard, and, on April 27, 1948, the District Court made its order that "The motions to dismiss are granted" (R. 196-197).

The District Court made certain observations on the failure of the complaint to negative laches, on the insufficiency of averments of mere intrinsic fraud, and ordered the dismissal of the case (R. 196-198).

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\*By stipulation, defendant Central Pacific Railway Company joined in the motion (R. 190).

The appellants apparently construe the order granting the motions as denying the motions on all grounds except laches (Appellants' Brief p. 51). We do not so construe the order.

But, in any case, if the motions to dismiss should have been granted on any of the grounds upon which they were based, this Court should affirm the judgment of dismissal.

In *McBrine Co. v. Silverman* (9th Cir.), 121 F.2d 181, this Court said (p. 182):

"We affirm the dismissals; not, however, on the ground assigned by the trial court, \* \* \*. That we may affirm on a ground not assigned by the trial court is well settled. *Collier v. Stanbrough*, 6 How. 14, 21, 12 L.Ed. 324; *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208, 210, 41 S.Ct. 451, 65 L.Ed. 892; 3 Am.Jr., Appeal and Error, Sec. 1163, p. 674; 5 C.J.S., Appeal and Error, Sec. 1849, pp. 1334, 1335."

The motions to dismiss were based on various grounds set forth in the respective notices of motion but the grounds advanced may be condensed into the following:

1. That the allegations in the bill of complaint are insufficient to state a cause of action or to state a claim for equitable relief in favor of any of the plaintiffs or any of the persons on whose behalf the action is brought against any of the defendants (R. 82).

2. That it appears by the bill of complaint itself that the alleged causes of complaint are stale and that plaintiffs and their ancestors have been guilty of gross laches (R. 83).



3. That it appears from the certified copies of court records (subsequent to 1906) attached to the affidavit filed with the motions that plaintiffs and their ancestors were guilty of gross laches in that the alleged causes of complaint were known by them for a great many years prior to the filing of the bill of complaint (R. 83); and such affidavits show, furthermore, that the doctrine of laches applies because, during such delay on the part of plaintiffs and their ancestors, the court records in connection with the Estate of Mark Hopkins (R. 101), as well as essential private records of defendants were destroyed in the 1906 fire (R. 185), and any possible witness who could have knowledge of any of the pertinent facts has long since died, thus prejudicing defendants in their ability to defend this case (R. 102 and 186).

4. That insofar as the bill of complaint sought relief on the ground of fraud it was barred by the Statute of Limitations and particularly by Subdivision 4 of Section 338 of the Code of Civil Procedure of California and insofar as it seeks to determine title to real property, by Section 318 and by Section 319 of said Code (R. 84).

5. That insofar as the bill of complaint sought to have the District Court determine who were in fact the heirs of Mark Hopkins or to have it appoint an administrator *de bonis non*, it failed to state a claim within the jurisdiction of that court (R. 84, 85).

6. That the court lacked jurisdiction over necessary and indispensable parties, namely the successors in interest of Moses Hopkins and of Mary Frances Sherwood Hopkins who were not included among either the plaintiffs or the defendants (R. 86).

## I.

**THIS COURT, IN FREEMAN VS. HOPKINS, 32 FED.(2) 756 (NO. 5672)\* HAS ALREADY PASSED UPON THE PRINCIPAL ISSUES HERE INVOLVED, AFFIRMING THE DISMISSAL OF THE ACTION BY THE DISTRICT COURT.**

The Complaint in *Freeman v. Hopkins* was filed in the United States District Court in San Francisco on February 27, 1927, by or on behalf of some of the same plaintiffs as those by or on whose behalf this suit was brought (e.g., plaintiffs Griffin and Chambers—see Record in this court in Case No. 5672, pp. 25 et seq.). The gist of that case, as stated in the opening sentence of the decision, was stated by Judge Dietrich as follows:

“Norman Lee Freeman, claiming to be an heir of Mark Hopkins, deceased, brought this suit for himself and in behalf of about 450 other alleged heirs, a list of whose names is exhibited with the bill. The object of the suit is to establish a trust in favor of all such heirs, in securities of great value which it is charged were the property of Hopkins at the time of his death and which are presently in the possession of the defendant banks. Generally it is alleged that the securities were fraudulently concealed from the knowledge of the court in the probate proceedings by the deceased’s widow and his brother Moses Hopkins, who were successively administratrix and administrator of the estate, and who were the only beneficiaries named in the decree of distribution, which was entered while the latter was administrator. \* \* \* Sustaining defendants’ motions, the court below entered a decree dismissing the suit, with prejudice, ‘because of laches on the part of plaintiff and for want of equity’ in the bill.”

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\*Certiorari denied, 280 U.S. 575.

Similarly on May 2, 1947, more than twenty years later, the present suit was brought by appellants (plaintiffs below), claiming to be heirs of Mark Hopkins, deceased, for themselves and on behalf of some 205 other alleged heirs, a list of whom is annexed to the bill of complaint (R. 70 et seq.). The object of this suit is to set aside the decree of distribution of November 1, 1883 in the Estate of Mark Hopkins, deceased, on the ground of alleged fraud, that the property therein sought to be distributed did not pass to the distributees therein named but to the plaintiffs herein, subject to administration, etc. R. 46-7). The court below sustained defendants' motions to dismiss (R. 196-7).

In the *Freeman* case, supra, this Court said at p. 758:

"In the absence of extrinsic fraud of a material character, generally a decree of distribution made by a probate court having jurisdiction constitutes an adjudication in rem and is binding upon all the world. There is here no question of jurisdiction. \* \* \* Having due notice of the intention of the court to distribute the estate and close the administration, it was the duty of all persons having claims to assert them. The court's jurisdiction was not restricted to property inventoried or of which it otherwise had knowledge. Its right and duty was to determine to whom the residue of the estate, the unknown as well as the known property, belonged, and to decree its distribution accordingly: \* \* \*

"By section 1666 of the California Code of Civil Procedure, it is provided that: 'In the order or decree (of distribution), the court must name the persons and the proportions or parts to which each shall be entitled. \* \* \* Such order or decree is con-

clusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.' ”

And again on page 759:

“Upon the subject of laches it is to be noted that this suit was not commenced until February 25, 1927, almost 49 years after Mark Hopkins died and more than 43 years after the administration of his estate was closed. Clearly, we think, to avoid the charge of laches after such a lapse of time, much more should be required than the vague, meager allegations of the bill touching the alleged concealment and the discovery of the alleged fraud. We have scarcely more than the bald statement that Moses Hopkins, and later his friends, concealed properties, and that recently plaintiff accidentally discovered their existence.”

The present case was commenced about sixty-nine years after Mark Hopkins died and about sixty-four years after the decree of final distribution was entered closing his estate, and more than twenty years after the plaintiffs or their representatives filed the case of *Freeman v. Hopkins*, supra, which alone shows their knowledge of the essential facts; and we still have practically nothing more than the bald statement that the plaintiffs accidentally discovered the existence of many of the facts alleged only a short time before the commencement of this proceeding, but with no explanation of how, or why not sooner.

We submit, therefore, that the decision of this Court in *Freeman v. Hopkins*, supra, is equally applicable to the state of facts set forth in the complaint in the present case.



## II.

**THE BILL OF COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION IN FAVOR OF ANY OF THE PLAINTIFFS AGAINST ANY OF THE DEFENDANTS, AND FAILS TO ALLEGE FACTS WARRANTING ANY EQUITABLE RELIEF IN FAVOR OF ANY OF THE PLAINTIFFS.**

**A. The Bill of Complaint Fails to Show That Plaintiffs Have Any Claim to or Interest in Any Property at Any Time Owned by Mark Hopkins.**

The bill of complaint seeks to have the final decree of distribution in the Estate of Mark Hopkins set aside because of various alleged fraudulent acts of Mary Frances Sherwood Hopkins and Moses Hopkins to whom the estate was distributed and because the decree is allegedly void on its face (R. 8-40).

The bill of complaint fails to allege facts showing that any of the plaintiffs or any of the persons on whose behalf the action is brought would have any interest in any of the property of which Mark Hopkins died possessed, assuming all the facts alleged in the bill to be true and assuming they were sufficient to warrant the granting of the relief prayed for and assuming the action had been timely brought and that the court had jurisdiction.

It is alleged in the complaint:

“That the said Mark Hopkins died leaving the following heirs at law: Moses Hopkins, James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin, who were the brothers and sisters of the deceased.” (R. 6).

But it is nowhere alleged that any of the plaintiffs or any of the persons on whose behalf the action is brought has succeeded to any of the interest of any of these heirs



by transfer, by inheritance, by will or otherwise. It is alleged that the plaintiffs are the "descendants" of the alleged heirs of Mark Hopkins (R. 20), and it is alleged that the persons named in Exhibit "F" attached to the complaint "are the next of kin and collateral heirs" of Mark Hopkins. But the estate of a decedent dying intestate vests in his heirs at the time of his death (California Probate Code Sec. 300\*), not in those who may constitute his only living next of kin on a date seventy years later.

There is annexed to the complaint a copy of a judgment rendered by the Superior Court of Randolph County, North Carolina, in 1931, purporting to find that certain persons "are the sole heirs at law of Edward Hopkins, Hannah Crow Hopkins and of Mark Hopkins and Moses Hopkins" (R. 151). Whatever the effect, if any, of that judgment may be, it does not establish that any of the plaintiffs or others on whose behalf this action was brought have succeeded to any of the interest in the property of Mark Hopkins which may have vested in the alleged heirs, the alleged brothers and sisters of Mark Hopkins, who the complaint alleges were fraudulently deprived of their inheritance.

The complaint alleges only that the plaintiffs are descended from the defrauded heirs. It does not state that plaintiffs or their ancestors were their devisees or legatees, or succeeded to their rights and properties. The complaint therefore fails to establish any remedial interest in the plaintiffs in or to the cause of action and the Court below properly dismissed the same (47 C.J. 21, Parties Sec. 29).

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\*This provision was also in the former Sec. 1384 Civil Code as it stood since 1874.

**B. The Complaint Fails to Allege That Any of the Defendants Were Guilty of Any of the Fraudulent Acts Complained of or Had Any Knowledge Thereof or Any Knowledge of Facts Which Should Have Put Them Upon Inquiry.**

Except for plaintiffs' contention that the decree of distribution in the Estate of Mark Hopkins was void upon its face, the claim of plaintiffs is predicated entirely upon certain alleged fraudulent acts of Moses Hopkins and Mary Francis Sherwood Hopkins occurring between April, 1878 and November, 1883.

Nowhere in the complaint is it alleged that any of the defendants at any time had any knowledge of this fraud, or were parties to it in any way, or had knowledge of any facts which should have put them upon inquiry.

The nearest approach to such an allegation is found in paragraph 43 of the complaint (R. 33-34) in which it is alleged:

“\* \* \* that by the recitals in said deed the Ione Coal and Iron Company and its successor, Western Investment Co., and Charles S. Howard Co., and the Western Investment Company, defendants herein, and each of them was put on notice as to the interest of the estate of Mark Hopkins in said land, the issue of the heirs of said decedent, the provisions and defects in the decree of distribution, all as more particularly set forth in Plaintiff's first cause of action.”

A copy of the deed referred to is attached to plaintiff's complaint marked Exhibit “D” (R. 61-68). An examination of the deed discloses no recitals which could conceivably put anyone on notice of the fraud alleged. In any case the allegation falls far short of alleging that defendants were put on notice of the fraudulent acts alleged.

In this connection it is immaterial that the alleged fraudulent acts may have constituted extrinsic fraud as distinguished from intrinsic fraud. It is firmly established in California that when a decree of distribution in a probate proceeding has been obtained through extrinsic fraud, a court of equity has no power to set aside the decree, but that its power is limited to holding the distributees who have fraudulently obtained the property to be trustees for the rightful claimants. The leading case establishing this proposition is *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, in which the court says (135 Cal. at 328 and 330):

“The title conferred by a decree of distribution, after regular proceedings in probate, has always been justly recognized as a title of high and unimpeachable value, because of the nature of the proceedings and of the exclusive jurisdiction which has been vested in the probate court to pass upon the questions involved. If such a decree may at any time be vacated in equity it must result that no title any longer stands secure.

\* \* \* So here we hold that, under our system, the utmost that the court in equity could do, if it finds the facts to be as alleged, would be to decree that the defendant Paul Reuss holds title as trustee of the minor plaintiffs, and compel him to make a conveyance and transfer to them accordingly of all that he may have obtained from the estate of the deceased to which they were entitled, or, if a conveyance of specific property may not be had, then to hold him accountable to the plaintiffs for the value thereof. This we believe to be the limit of the power in equity in dealing with the matter, and it is in accordance with the principle adopted by the English courts, expressed by Pomeroy as follows: ‘When probate is

obtained by fraud, equity may declare the executor or other person deriving title under it, a trustee for the party defrauded.' "

This being true, it follows that no cause of action is stated in equity as against the defendants who acquired title by mesne conveyances from grantees of the distributees as it is not alleged that they took title with notice of the fraud.

*Hayden v. Hayden*, 46 Cal. 332, quoting from headnote:

"If a judgment on the face of the roll appears to be valid, those who purchase property on the faith of it are protected, even if it was procured by fraudulent practice, if they had no actual notice of such fraudulent practices."

See also:

*Pettis v. Johnston*, 78 Okla. 277, 190 Pac. 681 (Par. 6 on p. 691);

*Freeman On Judgments*, 5th Ed. Vol. 3, Sec. 1211.

It is equally well settled that a final judgment or decree of final distribution will not be set aside, even though obtained by extrinsic fraud, as against innocent third parties who have acquired title in reliance thereon.

*Doyle v. Hampton*, 159 Cal. 729; 116 Pac. 39,

quoting from headnote (159 Cal. at 730):

"A judgment quieting the title to land, which was so fraudulently obtained but which was valid upon its face, will not be vacated at the instance of the person defrauded, as against a subsequent *bona fide* purchaser of the land, who acquired it upon the faith of the judgment, for a valuable consideration, and with-



out notice or knowledge of any fact tending to show fraud in the matter of obtaining the judgment.”

*Hayden v. Hayden*, 46 Cal. 332; 49 C.J.S. 701, Judgments, Sec. 345.

The Appellants apparently base their case largely upon the assumption (unsupported by any argument or authority) that the execution by Moses Hopkins and Mary Frances Sherwood Hopkins of certain deeds conveying their interest in certain property as heirs of Mark Hopkins prior to the rendition of the decree of final distribution constituted a fraud (Appellants' Opening Brief, pp. 2 and 3). Wherein this constituted a fraud on any one is not shown or suggested. The right of an heir to convey his interest in a decedent's estate prior to distribution has always been recognized (11B. Cal. Juris. p. 827). The very recitals in this particular deed negative any suggestion of fraud.

**C. The Facts Alleged Are Not Sufficient to State a Cause of Action Based on Extrinsic Fraud in the Procurement of the Decree of Final Distribution.**

Obviously to the extent that the complaint alleges fraudulent acts amounting only to intrinsic fraud, it does not state a cause of action, and this proceeding would constitute a collateral attack upon a decree which has long since become final. This the appellants apparently concede (Appellants' Opening Brief, p. 10 and pp. 35-41).

The appellants contend, however, that the complaint alleges acts constituting extrinsic fraud although they fail to point out in their brief how the alleged acts could constitute such a fraud.



Extrinsic fraud in the procurement of a judgment or decree is a fraud which is dehors the issues and consists of a fraud or deception which prevents a party from having his day in court.

Probably the most recent decision in California on this point is *Gale v. Witt* (Cal. Supreme Court Jan. 27, 1948) 188 P. 2d 755, 31 A.C. 371 at p. 374, where the following language appears:

“ ‘The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic.’ (Westphal v. Westphal, 20 Cal. 2d 393, 397 (126 P. 2d 105); Howard v. Howard, 27 Cal. 2d 319 (163 P. 2d 439); Neblett v. Pacific Mut. Ins. Co., 22 Cal. 2d 393 (139 P. 2d 934); Olivera v. Grace, 19 Cal. 2d 570 (122 P. 2d 564, 140 A.L.R. 1328).) (1) The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. (Thompson v. Thompson, 38 Cal. App. 2d 377 (101 P. 2d 160); Godfrey v. Godfrey, 30 Cal. App. 2d 370 (86 P. 2d 357).)”

Now what facts do plaintiffs allege which could possibly constitute extrinsic fraud perpetrated in procuring the decree?

It is alleged that at the time of applying for letters of administration Mary Frances Sherwood Hopkins knew of the names and addresses of the alleged brothers and sisters of Mark Hopkins and with intent to defraud concealed their names and addresses from the court and from the clerk and that the clerk by reason of said fraud failed to

mail to said heirs notice of the time and place of the hearing on such application (R. 7). But there was no such legal requirement at that time.

The same allegation is made respecting the hearing on the application of Moses Hopkins for letters of administration (R. 8).

It is also alleged that at no time prior to or during the probate proceedings did either Mary or Moses Hopkins notify the said heirs of the death of their brother (R. 21).

It is also alleged that the alleged heirs had no notice or knowledge of the filing of the petition for final distribution (R. 19).

That is all.

Obviously, the writing of a letter by Moses Hopkins at some time "in the early eighties" and possibly long after the decree had become final to the effect that Mark Hopkins died leaving a wife and nine children (R. 21) could not constitute extrinsic fraud or any fraud at all in the procuring of the decree. The court below expressly so found (R. 197). Any representations made to the court by either Mary or Moses Hopkins as to their relationship to the decedent and as to the existence or non-existence of other heirs would be intrinsic and not extrinsic fraud.

In *Hill v. Lawler*, 116 Cal. 359, 48 Pac. 323, the court said (116 Cal. at 361, 2):

"By filing the petition for the distribution of the estate, and giving the notice required by section 1665 of the Code of Civil Procedure, the superior court acquired jurisdiction to distribute the estate 'among the persons who by law were entitled thereto.' The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also

the 'proportions or parts' to which each of these persons is entitled; and the 'parts' of the estate so distributed may be segregated or undivided portions of the estate. It is declared in section 1666 that 'in the order or decree the court must name the persons and the proportions or parts to which each shall be entitled,' and also: 'such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal.' A proceeding for distribution is in the nature of a proceeding *in rem*, the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court. (*Estate of Griffith*, 84 Cal. 107; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61.)"

And in *Goodrich v. Ferris*, 145 Fed. 844 (Circuit Court, Northern District of Calif.) Judge Morrow said, at page 859, 860:

"If in such proceeding the entire world is called before the court, and to enable the court to enter a

valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such a rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid. 'Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings in rem.' *Case of Broderick's Will*, 21 Wall. 503, 519, 22 L.Ed. 599."

At the time of the administration of the estate of Mark Hopkins the statutes of California did not require that notice of hearing upon a petition for letters of administration be mailed to the heirs.

The requirement for notice was then set forth in Sec. 1373 of the Code of Civil Procedure. This section, as enacted with the adoption of the Codes in 1872, and which was in effect in that form in 1878, when the petition for letters of administration was filed in the Mark Hopkins Estate (R. 6), read as follows:

"When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the

place where the court is held, containing the name of the decedent, the name of the applicant, and the term of the court at which the application will be heard. Such notice must be given at least ten days before the hearing.”

It was not until 1921 that Section 1373 was amended to require the Clerk to give notice by mailing to the heirs.

Furthermore, at that time the requirement for naming the heirs in a petition for letters of administration was only directory but not mandatory. At that time Section 1371 Code of Civil Procedure, read:

“1371. (Sec. 58.) Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the Clerk of the Court, stating the facts essential to give the Court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.”

But it was held in *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965, that an order admitting a will to probate is not void because of the omission to state in the petition the names, ages, and residences of the heirs, legatees, and devisees of the decedent, notwithstanding the same were known to the petitioner, and that an action in equity will not lie to set aside such order. The following language appears in the decision (28 Cal. App. at pp. 601-2):



“\* \* \* even defects in the statement of jurisdictional facts *actually existing* shall not affect the validity of an order admitting a will to probate. The probate of wills and the administration of estates of deceased persons are in the nature of proceedings *in rem*, as to which jurisdiction may be obtained by publication of notice. To sustain appellants’ contention and hold that jurisdiction to make such an order depends upon a correct and truthful statement of petitioner’s knowledge as to the names and residences of existing heirs, (a fact which appellants claim is not finally adjudicated by the probate court, but can be raised by another action in another court of any subsequent time), would lead to most embarrassing and intolerable results. The petition filed and upon which the order was made after due publication of the notice required by section 1303 of the Code of Civil Procedure, stated the jurisdictional facts required by subdivision 1 of section 1300 of the Code of Civil Procedure. The omission from the petition of a statement of the names, ages, and residences of the heirs, legatees, and devisees of the decedent, even if known to the petitioner, as alleged, could not operate to render the order void for want of jurisdiction, any more than omitting from the petition a statement as to the probable value and character of the estate.”

Again, during the time when the probate proceedings were pending, and when the decree of final distribution of the Mark Hopkins Estate was signed by Judge Coffey (R. 144-8), the only legal requirement for notice to the heirs was set forth in Section 1668 Code of Civil Procedure, which at that time read as follows:

“The order or decree may be made on the petition of the executor or administrator, or of any person in-

terested in the estate. *Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered.* If partition be applied for as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.” (Emphasis supplied.)

Therefore, the failure to name the heirs did not and could not have prevented them from receiving all of the notices required by law nor prevent them from appearing; and there was no legal requirement for specific, or mailed, notice to them.

For aught that appears from the complaint, every notice of the probate proceeding required by law was duly given. It is so presumed as a matter of law, Code of Civil Procedure Sec. 1963, Par. 15, 16, 17 and 33. Mary Frances Sherwood Hopkins and Moses Hopkins made no representations of any kind to the alleged heirs prior to the rendition of the decree, and they did not do any act to prevent or which prevented the heirs from appearing and asserting their claim. All that Mary and Moses are alleged to have done was to fail to present the names of those heirs to the court and to the clerk.

That this alone does not constitute extrinsic fraud in the procurement of the decree is well settled by a consistent line of California cases.

*Monk v. Morgan*, 49 Cal. App. 154, 192 Pac. 1042;

*Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158;

*Beltran v. Hynes*, 40 Cal. App. 177, 180 Pac. 540.

In *Monk v. Morgan*, supra, the court said, 49 Cal. at p. 160:

“It may be further stated *in limine* that the defendant, George Morgan, either in his capacity as a co-heir with said plaintiffs in said estate or in his capacity as administrator thereof, owed to the plaintiffs herein no further duty in the way of informing them either of the death of Henrietta M. Cox or of the fact of his appointment to be the administrator of her estate, or of the various steps taken by him as such administrator or by the court in such administration up to and including the entry of the decree of distribution therein, other than that which would have been afforded to them, and each of them, through the giving of the notices required by law to be given during such administration, and which having been duly given constituted constructive notice to said plaintiffs as to the death of the decedent and as to all proceedings taken and had in the course of the administration of her estate.”

and at page 161:

“While there is much cogency in this contention we are constrained to hold, in the light of the foregoing cases so relied upon by the appellants herein, that were the respondents to place their reliance solely upon the fact that the defendants herein, in seeking and proceeding with the probate of said estate, indulged in the various acts and assertions and engaged in the giving of the false testimony attributed to them, and thereby so far imposed upon the court as to induce it to make and enter its decree of distribution giving to said defendants the whole of said estate to the exclusion of the plaintiffs herein equally entitled to an undivided one-half thereof, they could not be held to have made a sufficient showing herein to have justified the judgment in their favor, since all of the aforesaid acts and conduct of the defendants must be held, in the light of the foregoing au-

thorities, to have constituted intrinsic fraud from the effect of which the plaintiffs cannot have relief in a court of equity.”

Appellants in their brief cite two cases in support of the proposition that the failure of an administrator to report to the court all property belonging to the estate constitutes extrinsic fraud. They are *Weyant v. Utah Savings and Trust Co.*, 54 Utah 181, 182 Pac. 189, and *Goodrich v. Ferris*, 145 Fed. 844. Neither case is even remotely in point.

*Weyant v. Utah Savings and Trust Co.* involved an action upon an administrator's bond. A woman with whom a married man had eloped probated his estate under a false name and, pretending to be his wife, had the estate distributed to her. The court among other things held that none of the notices required by the statute was given as they were given under a false name.

*Goodrich v. Ferris* was an action filed in the United States District Court for a decree adjudging that a certain final decree of distribution rendered by the Superior Court of the City and County of San Francisco was of no force and effect as to complainant and for a decree that defendants be held trustees of certain property which complainant claimed he was entitled to as the heir of his deceased wife who was a daughter of the decedent whose estate had been probated. The complaint in that case rested on the ground of the failure of complainant to receive notice of the probate proceedings and on alleged false representations by the executor to the effect that the complainant's wife inherited none of her father's estate.



After an exhaustive review of the cases the District Court dismissed the complaint.

**D. The Facts Alleged in the Complaint Do Not Show the Decree of Final Distribution Was Void on Its Face.**

In paragraph 19 of the complaint (R. 9) the plaintiffs set forth in paragraphs lettered A to M various allegations purporting to show that the decree of final distribution in the estate of Mark Hopkins was "void." In the brief filed with this court appellants cite not a single authority in support of the proposition that the decree, a copy of which is attached to the complaint (R. 49-53) is either void or void on its face.

Only in paragraph lettered "A" (R. 9) and in paragraph "J" (R. 17) are there any allegations which even bear upon the question of whether or not the decree was void upon its face.

In paragraph "B" (R. 9) it is alleged that: "The said decree affirmatively shows on its face that no notice was given to all the heirs as required by law existing at that time." That this allegation is untrue is shown by an examination of the decree itself, a certified copy of which is attached to and made a part of the complaint. On the contrary the decree recites:

"And said account and petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court that the Clerk had given notice of the settlement of said account and the hearing of said petition in the manner and for the time heretofore ordered and directed by this Court."  
(Tr. 49)



It is then alleged in this paragraph that in 1878 the law required that notice be mailed to each of the "said heirs and legatees." This is erroneous. In appellants' brief at page 33 appears an alleged quotation to that effect from *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. 767. No such language appears in that decision. There was no such legal requirement. Sec. 1668 Code of Civil Procedure, quoted above as it then read, required only *posting* of notices, not mailing. This constituted due process of law and gave the Superior Court jurisdiction to issue letters of administration. *Estate of Bump*, 152 Cal. 274, 92 Pac. 643.

In paragraph J of the complaint it is alleged (R. 17) "That said decree (of distribution) is indefinite as to the heirship and purported distribution attempted to have been made by said decree" (R. 17). It is true that the decree does not specifically find who are the heirs, but it does purport to distribute the property to the persons which the court found entitled thereto and that is all that was then required by Section 1666 of the California Code of Civil Procedure. That such a decree was sufficient and valid on its face is established by *Miller v. Pitman*, 180 Cal. 540, 182 Pac. 50.

Decrees in probate upon collateral attack are supported by the same presumptions as to validity and the jurisdiction of the court to render them as attach to judgments generally.

*Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458.

Copy of the decree is attached to the complaint and made a part thereof, and speaks for itself. By every test it

appears upon its face to be a valid decree rendered by a court having jurisdiction of the subject matter.

In the absence of anything on the face of the decree to the contrary, it will be presumed that all notices required to give the court jurisdiction were duly given.

*Miller v. Pitman*, 180 Cal. 540, 182 Pac. 50.

It is well settled that the jurisdiction of the Probate Court to administer upon the estate of a decedent is not affected by the failure to name in the petition for the appointment of an administrator or for the probate of a will the name of an heir, even though known to the petitioner, so long as the notices provided for by statute are given.

*Murray v. Superior Court*, 207 Cal. 381, 278 Pac. 1033;

*Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965;

*Farmers etc. National Bank v. Superior Court*, 25 Cal.(2d) 842, 155 P.2d 823.

It is also well established that absence of a requirement for personal notice in probate proceedings does not deprive an interested person of any of his constitutional rights.

*Lilienkamp v. Superior Court*, 14 Cal.(2d) 293, 93 P.2d 1008.

#### **DISTRIBUTION OF THREE-FOURTHS OF ESTATE TO THE WIDOW WAS NOT IMPROPER**

Appellants' contention that the decree of distribution in the Mark Hopkins Estate was void because it purported

to distribute three-fourths of the estate to the widow, is also without foundation. The Community Property Law was in effect in California at that time. Sec. 1402 of the Civil Code as it then read, provided as follows:

“Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. \* \* \*”

The widow was, therefore, entitled to one-half of all the estate as her community property share; and, on account of the absence of a will and the absence of descendants, the remaining one-half was treated as separate property. The law of succession with respect to separate property then appeared in Sec. 1386, paragraph 2, of the Civil Code. This paragraph, as it stood at the time of Mark Hopkins' death, and the commencement of the probate proceedings (Amendments to the Codes 1873-74, 236) read as follows:

“Two—If the decedent leave no issue, (and) the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of

representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leaves no issue, nor husband, nor wife, the estate must go to the father."

In 1883, when the decree of final distribution was made, paragraph 2 of Sec. 1386 of the Civil Code had been amended April 23, 1880 (Amendments to Codes, 1880, page 14), to read as follows:

"2. If the decedent leave no issue, the estate goes, one-half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other."

On account of the absence of a will, and the lack of any descendants, the remaining one-half of the estate, treated as separate property, therefore passed one-half to the widow and one-half to the brothers and sisters of the decedent. The widow thus acquired one-half of the estate as community property and one-half of the remainder as her share of the separate property, making three-fourths altogether. This was one of the well-recognized rules of succession at that time.

**ALLEGATION OF LACK OF CAPACITY OF ADMINISTRATOR IS NOT AN  
ALLEGATION OF EXTRINSIC FRAUD AND COMES TOO LATE**

The plaintiffs also contend that the appointment of Moses Hopkins in substitution for the original administratrix in 1881, made all subsequent proceedings void because it is alleged (R. 81) that one Moses T. Hopkins had been convicted of an infamous crime in North Carolina in 1845, and hence under then Sec. 1369 C.C.P. he did not have the legal capacity to serve as an administrator.

His qualifications to serve must have been one of the matters passed upon by the Superior Court in San Francisco at the time of his appointment; and if the plaintiffs' allegations are true, then presumably his appointment was based upon perjured testimony; but that would be intrinsic rather than extrinsic fraud, and not a ground for attack upon the probate proceedings at this time. See 1 Bancroft's Probate Practice, Sec. 277, pp. 529, 530, where the following language appears:

"It is also settled beyond controversy that if the probate court had jurisdiction to appoint someone as representative, the fact that it erred in selecting an appointee does not make its appointment subject to collateral attack. Where a foreign corporation not authorized to do business within the state is appointed, whether or not the appointment is improper so that it might be reversed on appeal or the letters revoked by proper proceeding, so long as it stands it may not be attacked by demurrer to a complaint in an action brought by such corporation as representative. *Similarly the fact that the person who administered upon an estate was a non-resident, and therefore incompetent, is not such a fraud as avoids the administration proceedings.* That a person applying



for letters is a nonresident may be good ground for opposing his appointment, and good cause for removing him after he has been appointed, but his acts as administrator, when once appointed, are neither void nor voidable and cannot be set aside for that reason. This is so even where the acts are attacked during the progress of the administration, and, for a much stronger reason, it is not ground for setting them aside on collateral attack after the administration has been closed. \* \* \*

“Under settled general principles, a judgment appointing a representative, like any other judgment, is never subject to collateral attack because of intrinsic fraud.” (Emphasis supplied.)

Under Section 1369 Code of Civil Procedure, as it read up to the time of the adoption of the Probate Code, a person was just as disqualified to act as administrator if he were a nonresident as though he had committed an infamous crime as alleged here; and hence, under the authority cited, his appointment by the court is not such a fraud as to invalidate the probate proceedings; and, unless and until his appointment is revoked, his acts are valid. 2 Bancroft's Probate Practice, Sec. 337, pp. 643, 4 and note in 14 A.L.R. p. 619 et seq.

Furthermore, ever since 1872, when the Codes were adopted in California, the State law has provided a remedy for the situation where an administrator was incompetent to act, such proceedings being taken in the superior court where the probate proceedings were pending. On August 26, 1881, when Moses Hopkins, who is alleged to have lacked the necessary qualifications of administrator because of having in 1845 been convicted

of an infamous crime (R. 81) was appointed administrator of the Mark Hopkins Estate (R. 7), the situation was provided for in Section 1436 of the Code of Civil Procedure which then, as amended in 1880 (Amendments to the Codes, 1880, p. 84), read as follows:

“1436. Whenever a Judge of a Superior Court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, *or is incompetent to act*, or has permanently removed from the State, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the Court, suspend the powers of such executor or administrator until the matter is investigated.” (Emphasis supplied.)

Substantially the same provision is still in effect (Probate Code Section 521).

So, also in 1 Bancroft's Probate Practice, Sec. 275, p. 525, the following language appears:

“The order granting letters adjudges of necessity the right of the person to whom they are granted to such letters. Until reversed or set aside by some proper method, it is conclusive upon the right to administer.”

And in California, from the time of the adoption of the Codes until the adoption of the Probate Code in 1931, Section 1428 Code of Civil Procedure, read as follows:

*“All acts of executor, etc., valid until his power is revoked. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.”*

This provision was carried forward in substantially the same language in Sec. 525 of the Probate Code.

The acts of Moses Hopkins as administrator of the estate of Mark Hopkins are, therefore, presumptively valid; and it is certainly too late now, especially after the destruction of the records in 1906, and the lapse of so much time, and after conditions are so changed, and without any explanation of why the contention was not made sooner, to allege for the first time that Moses Hopkins did not have the capacity to serve as administrator in 1881, because a Moses T. Hopkins in 1845 had been convicted of an infamous crime in North Carolina.

Where, as here, the records have been destroyed, there is every presumption of the regularity of the proceedings. *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825. See also presumptions specified in Code of Civil Procedure, Sec. 1963, Pars. 15, 16, 17 and 33.

**THE DECREE OF DISTRIBUTION OF NOVEMBER 1, 1883, WAS A DECREE OF FINAL, NOT PARTIAL, DISTRIBUTION**

Appellees contend with some earnestness that the decree of distribution in the Mark Hopkins Estate (R. 144-148) was only a decree of partial distribution instead of a decree of final distribution as it purports to be. This claim is based upon the allegation that it failed to distribute a

large part of the estate which at one time was known to be in the hands of the administratrix or the administrator, as the case may be, and that in such event, the decree having been made upon petition of the administrator, was void. This contention is also without foundation. While the petition on which the decree was based was doubtless among the papers destroyed in the San Francisco Fire, the decree itself recites that the administrator had filed an account for final settlement and "with said account filed a petition for the final distribution of the estate." (R. 144).

The decree of final distribution after various recitals and findings, included the following (R. 146):

"It is further ordered, adjudged and decreed that said final accounts of the said Administrator be and the same are settled, allowed and approved and that the residue of said Estate hereinafter particularly described *and any other property not now known or discovered which may belong to said Estate, or in which the said Estate may have any interest*, be and the same is hereby distributed as follows. Three-fourths of said Estate to be distributed to the widow of said deceased, Mary-Frances Sherwood Hopkins, and one-fourth of said Estate to be distributed to the brother of said deceased, Moses Hopkins." (Emphasis supplied.)

Then follows a particular description of the residue of the estate which does not include all of the assets which plaintiffs allege it should have included; and from that they draw the conclusion that substantial assets remained undistributed.

Plaintiffs, however, failed to recognize the very general practice of distributing large estates peacemeal, from time to time, by decrees of partial distribution prior to final distribution; and nowhere in the record does it appear that a large part of the Mark Hopkins estate had not previously been lawfully distributed to the heirs by decrees of partial distribution, leaving only in the hands of the administrator on November 1, 1883, at the time of the decree of final distribution, the particular assets therein mentioned; and even if any assets had escaped particular description in the final decree, they would still be covered by the omnibus language therein, quoted above.

It is certainly too late now, after the destruction of the supporting records and the changed positions of the defendants due to long lapse of time, to contend that there was something irregular about the administrator's acts in 1883, or that the approval of the final account by the Court was improper, or that the decree did not cover all of the assets then remaining in the hands of the administrator.

It was plaintiffs' duty, if they were to claim some irregularity about the proceedings in the Mark Hopkins estate, to have taken timely action to have the papers restored under the Act of June 16, 1906 (Stats. 1906 Ex-Session, p. 73), which authorized the restoration of burned records. *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825.

Over forty years have elapsed since the San Francisco Fire, and as yet so far as known to appellees the plaintiffs below have taken no such action.



**THE DECREE OF DISTRIBUTION AND DEEDS CONTAIN GOOD AND  
SUFFICIENT DESCRIPTIONS OF THE REAL ESTATE INVOLVED**

The decree of final distribution in the Mark Hopkins estate contained among other things the following language (R. 148):

“It is further ordered, adjudged and decreed that the entire amount of the real estate of which the said Mark Hopkins died seized and possessed and in which the said Estate has any right, title or interest be and the same hereby is set aside and distributed to Mary Frances Sherwood Hopkins, widow of said deceased, \* \* \*”.

This is a sufficient description for a conveyance of real estate under the law of California. For illustration:

In *Pettigrew v. Dobbelaar*, 63 Cal. 396, the Court had under consideration a deed which it was alleged was void because it contained no description. The descriptive clause read:

“All lands and real estate belonging to the said party of the first part wheresoever the same may be situated, together,” etc.

The Court held that if the lands in controversy belonged to the grantor they passed by the deed.

In *Frey v. Clifford*, 44 Cal. 335, the descriptive words in the deed were:

“All my right, title and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon.”

The Court held the description was sufficient to convey the lots in controversy.

In *Brusseau v. Hill*, 201 Cal. 225, 256 Pac. 418, the Court held that an instrument reading "that this is my gift of deed, all is in my possession, to Mr. G. W. Brusseau after my death," is sufficient to convey a claimed parcel of real estate where the evidence showed that such parcel was all that the grantor possessed.

It is therefore respectfully submitted that the bill of complaint fails to state a cause of action, and the court below properly dismissed the same:

*First:* because it does not appear that plaintiffs have any remedial interest in or claim to any property at any time owned by Mark Hopkins.

*Secondly:* because insofar as the cause of action is based on an alleged fraud perpetrated by Mary Frances Sherwood Hopkins and Moses Hopkins, it is not alleged that any of the defendants participated in the fraud, had any knowledge thereof or of any facts which should have put them upon inquiry; and that insofar as the cause of action is based upon the claim that the decree of distribution was void upon its face the claim is rebutted by the decree itself, a copy of which is attached to the complaint.

*Thirdly:* because even if the complaint showed plaintiffs had any interest, and even if it showed the defendants took with knowledge of the fraud, the complaint does not set forth facts establishing extrinsic fraud in the procurement of the decree sufficient, under the decisions of the California Supreme Court or of this Court, to warrant interposition of a court of equity.

## III.

**IT APPEARS FROM THE BILL OF COMPLAINT THAT THE CAUSES OF COMPLAINT ARE STALE AND THAT THE PLAINTIFFS AND THEIR ANCESTORS HAVE BEEN GUILTY OF GROSS LACHES; AND THAT SO LONG A TIME HAS ELAPSED SINCE THE MATTERS AND THINGS COMPLAINED OF TOOK PLACE THAT IT WOULD BE CONTRARY TO EQUITY AND GOOD CONSCIENCE FOR THE COURT TO TAKE COGNIZANCE THEREOF.**

Sixty-nine years elapsed since the appointment of Mary Frances Sherwood Hopkins as administratrix of the estate of Mark Hopkins, and sixty-four years elapsed since the entry of the decree of final distribution, before the filing of the bill of complaint in this action. All of the persons having any personal knowledge of any of the facts upon which the claim is predicated have long since died. All of the original papers in the estate proceedings were destroyed by fire in 1906. This all appears from the complaint (Tr. 25, 27).

It is established beyond any question that when one attacks or seeks relief against a judgment rendered many years before and particularly when the action is grounded on fraud the plaintiff must in his complaint allege facts showing that he has used due diligence and is not guilty of laches.

This rule was applied by this court in affirming the dismissal of another bill involving the same estate and substantially the same allegations of fraud as set forth here.

*Freeman v. Hopkins* (9th Cir.) 32 Fed.(2d) 756;  
cert. den. 280 U.S. 575.

The rule has been repeatedly applied by the California Supreme Court and by the United States Supreme Court in similar cases.

In *Del Campo v. Camarillo*, 154 Cal., 647 at 657, 98 Pac. 1049 at 1054, the court says:

“In seeking relief against the effects of frauds occurring so long ago, and in asking a court to cancel the contract and deed, which, in itself, implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds.”

The rule is well stated in *California Jurisprudence* Vol. 10, p. 555, Equity §92, as follows:

“When a complaint for equitable relief shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, the complainant must allege circumstances showing good faith and reasonable diligence on his part. The complaint will be construed most strongly

against the pleader, and if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. After a great lapse of time and the death of the original parties equity, for the peace of society, scrutinizes with great particularity bills founded on an alleged belated discovery of facts, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicant for relief. It is not sufficient merely to allege ignorance of rights at one time and discovery at another. The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiff, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiff upon discovery, and what was the nature of the concealment practiced. Where relief is sought in equity against frauds occurring years prior to the suit, the plaintiff must allege in detail facts and circumstances showing that he did not discover it until within a reasonable time before suing, that he proceeded promptly on making the discovery, and that his failure to make it sooner was not due to his own negligence."

See also:

23 Cal. L. Rev. 79;

*Hammond v. Hopkins*, 143 U.S. 224; 12 S.Ct. 418;

36 L.Ed. 134.

In the light of the time that has elapsed and tested by this rule what does the bill of complaint allege:

1. That in the "early eighties" one Zebedee Russell "a relative of Mark Hopkins" received a letter from Moses Hopkins stating that his brother, Mark Hopkins,



had died leaving a wife and nine children and had willed all his estate to Moses Hopkins; that "said heirs" "relied on said statements and were lulled to sleep and abandoned the idea of making further investigation of said estate until years later when they discovered said statements were false and made for the purpose of deceiving the heirs at law and the heirs were thereby deceived. That in 1945, and upon the discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes, fraud, and misrepresentation by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to the estate." (R. 21, 22)

Clearly this does not even allege when the fraud was discovered. It does appear to allege, however, that the original heirs, now all dead, did discover the alleged fraud at some time "years later" during their lifetime.

2. At the end of paragraph 26 of the complaint the following statement is made: "These facts were not discovered by the plaintiffs or their predecessors heirs of Mark Hopkins, or by any of them until September, 1945." It is not clear what facts are referred to here but in any case it is not alleged how they were discovered, or why they were not discovered sooner, or what steps were taken to discover them. The allegation is even less explicit than that in the complaint held insufficient in this regard in *Freeman v. Hopkins* (supra).

3. It is alleged in paragraph 28 of the complaint that the fraud of Mary Hopkins in representing herself as the wife of Mark Hopkins "was not discovered by plaintiffs or their predecessors or by any of them until 1945 when

plaintiff discovered that she was only the housekeeper.” How this interesting discovery was made at this late date, or why the alleged discovery was not made sooner, is not disclosed (R. 25).

4. In paragraph 29 of the complaint it is alleged that plaintiffs and their ancestors have used due diligence, yet no facts showing diligence are pleaded (R. 25).

5. In paragraph 29 of the complaint it is alleged that in 1945, plaintiffs “by chance” and “after long research discovered the record of two deeds, one in Sacramento County and one in San Joaquin County.” What the significance of these deeds may be is not disclosed, but it does appear from the complaint that these deeds have been a matter of public record for over fifty years.

That these allegations are clearly insufficient to show due diligence and an absence of laches, under the facts alleged, is we believe settled by the above cited authorities and particularly by the decision of this court involving another attack upon the same decree of distribution.

*Freeman v. Hopkins* (supra) (9th Cir.), 32 Fed. (2d) 756 at 759 and 760.

**IT APPEARS FROM AFFIDAVITS FILED WITH THE MOTIONS AND FROM CERTIFIED COPIES OF DOCUMENTS ATTACHED THERETO THAT THE CAUSES OF COMPLAINT ARE STALE, AND THAT PLAINTIFFS AND THEIR ANCESTORS HAVE BEEN GUILTY OF GROSS LACHES, AND THAT THEY AND THEIR ANCESTORS KNEW OF THE FACTS ALLEGED IN THE COMPLAINT FOR A GREAT MANY YEARS PRIOR TO THE FILING OF THE COMPLAINT; AND THAT BY THIS DELAY DEFENDANTS HAVE BEEN PREJUDICED IN THEIR ABILITY TO DEFEND THE CASE.**

The appellees served and filed with the motions to dismiss the affidavit of Royal E. Handlos to which were attached certified copies of various documents constituting the official records of various proceedings had in the courts of the State of California and of the United States involving this estate from which it appears that most if not all of the facts alleged in the complaint were known to plaintiffs for at least twenty-two years prior to the filing of the complaint, or at the very least that they were possessed of information sufficient to put them upon inquiry (R. 90-194). Attention is directed particularly to the affidavits of Estella Cothran Latta (R. 163) and of Jones N. Griffin (R. 167) (plaintiffs herein) attached to an Order for Withdrawal of Certain Affidavits filed in the matter of the Estate of Mark Hopkins in the Superior Court of California in and for the City and County of San Francisco (Ex. K.R. 159).

**"Speaking" Motions, a Well Recognized Procedure.**

Appellants contend in their opening brief that the court erred in admitting over their objections the affidavit of

Royal Handlos and the exhibits attached thereto. This objection, however, is not included in appellants' list of "points upon which appellant intends to rely" filed pursuant to Rule 19 of the court and is therefore waived (R. 199-202). No objection is raised in either the brief or the points to the admission of the affidavit of Roy G. Hillebrand in support of the motion to dismiss of Southern Pacific Company.

It is respectfully submitted that the affidavits were properly admitted in support of the motions to dismiss on the ground of laches. They merely present indisputable facts in clarification and enlargement of the vague generalities of the complaint. They clearly support the defense of laches and the statute of limitations, defenses properly raised by a motion to dismiss. (*Freeman v. Hopkins*, supra (9th Cir.) 32 Fed.(2d) 756; *Gerard v. Mercer*, 62 Fed. Supp. 28 at 30). The affidavits brought before the court matters of public record and general notoriety such as the general conflagration in San Francisco in 1906, the destruction of the records in the County Clerk's office, and that defendants were prejudiced by the long delay. These matters could not be controverted. They show, among other things, that the facts upon which plaintiffs base their allegations of fraud have been known to them and their ancestors for very many years; and have been referred to in documents which have been matters of public record for upwards of twenty years.

The use of "speaking" motions to dismiss, supported by affidavits of noncontrovertible facts, has been a recognized practice in Federal procedure ever since the adoption of the Rules of Civil Procedure for the Federal

Courts, and long before the recent amendment to Rule 12(b), which expressly permits the use of such affidavits.

The propriety of the use of the Affidavits in such cases is illustrated in *Ellis v. Stevens*, 37 Fed. Supp. 488 at 490, where the Court said:

“I do not go so far as to hold that a matter of defense to the merits may be presented by a motion to dismiss for lack of a claim stated. I can agree that the allegations of the complaint, so far as they go, must be taken as true; but when, as in this case, the complaint is loosely drawn, with vague and indefinite allegations, and when the question is whether, on the complaint, the plaintiff is entitled to relief in this court, I am convinced that recourse to undisputed facts established by affidavit may be had in order to elucidate the allegations of the complaint.”

The Affidavit of Roy G. Hillebrand (R. 184) in support of the railroad motion, calling attention to the lack of record of the alleged holdings of plaintiffs or their ancestors in securities of the railroad, has a clear precedent in *Gallup v. Caldwell* (3rd Circuit) 120 Fed.(2d) 90, which was a suit by stockholders against a corporation. The defendant corporation filed motions to dismiss, etc., and submitted an Affidavit of the Secretary of the Corporation to the effect that plaintiffs were not stockholders of record. The District Court granted the motion. As to the propriety of such “speaking” motion the Court said at pp. 92 and 93:

“First. We are met at the outset by the question whether it was proper for the court below to make a preliminary investigation, which carried it outside of the pleadings, as to the plaintiff’s stock ownership. It



is to be noted that the question involved is not one going to the jurisdiction of the court. *Venner v. Great Northern Ry.*, 1908, 209 U.S. 24, 28 S.Ct. 328, 52 L.Ed. 666; compare *McNutt v. General Motors Acceptance Corp.*, 1936, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135; *KVOS, Inc. v. Associated Press*, 1936, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183; *Central Mexico Light & Power Co. v. Munch*, 2 Cir., 1940, 116 F.2d 85. The problem which, restated, is whether the Federal Rules of Civil Procedure countenance a 'speaking' motion to dismiss, has been much discussed since the adoption of the Rules. Each side of the question has drawn to it distinguished proponents. Their arguments and reasons are collected in a note in 9 Geo. Wash. L. Rev. 174 (Dec. 1940). We think that such procedure should be permitted especially in the kind of situation here presented. See 1 Moore's Federal Practice 645. Despite plaintiff's allegation of stock ownership it is clear that she was not a stockholder whose ownership was registered on the books of the corporation at the time suit was instituted. If record ownership is a prerequisite to the right to bring this action, then it is expedient that the point be decided preliminarily. The alternative would be to sanction discovery and perhaps other pretrial proceedings likely to be exceedingly burdensome upon both parties only to have the case ultimately dismissed at the trial because of the plaintiff's inability to prove a fundamental but initial point. This would not only be a needless waste of the court's time but it would run counter to the mandate of Rule 1 that the Rules 'be construed to secure the just, speedy, and inexpensive determination of every action.' "

The decision of the District Court was reversed, but on other grounds.

Perhaps one of the clearest statements along this line is in *National, etc. v. Montgomery Ward* (Dist. of Columbia) 144 F.2d 528, one of the leading cases, where the District Court had denied defendants "speaking" motion to dismiss. The United States Court of Appeals for District of Columbia concluded its opinion as follows:

"Even if the complaint had stated a sufficient claim the uncontradicted affidavits of the defendants would have shown that there was no genuine issue as to any material fact, and their motion for summary judgment should therefore have been granted. In our opinion the affidavits were pertinent, also, to the motion to dismiss. (footnote)

"Reversed."

(footnote, p. 531):

" 'It is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion. Federal Rules 6(d), 12(b), 43(e), 56(e), 28 U.S.C.A. following section 723c.' *Central Mexico Light & Power Co. v. Munch*, 2 Cir., 116 F.2d 85, 87. *Gallup v. Caldwell*, 3 Cir., 120 F.2d 90; *Victory v. Manning*, 3 Cir. 128 F.2d 415."

However, regardless of the affidavits, the complaint was properly dismissed on the ground of laches on the basis of the insufficiency of the complaint itself to negative laches in view of the time when the fraud is alleged to have occurred.

**THE BILL OF COMPLAINT, INsofar AS IT SOUGHT RELIEF ON THE GROUND OF FRAUD, IS BARRED BY THE STATUTE OF LIMITATIONS AND PARTICULARLY BY SUBDIVISION 4 OF SECTION 338 OF THE CODE OF CIVIL PROCEDURE OF CALIFORNIA; AND INsofar AS IT SEEKS TO DETERMINE TITLE TO REAL PROPERTY IT IS BARRED BY SECTION 319 OF SAID CODE.**

Section 338 of the Code of Civil Procedure of California requires that an action for relief on the ground of fraud must be brought within three years, but the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud.

When it appears from the complaint that the alleged fraud occurred more than three years prior to the commencement of the action plaintiff, as part of his cause of action, must allege facts showing that the fraud was not discovered until within three years.

In *Osmont v. All Persons*, 165 Cal. 587, 133 Pac. 480, it is held that an action in equity, for a decree holding distributees under a decree of distribution to be trustees of property which they obtained by extrinsic fraud, must be brought within three years after the discovery of the fraud; that it is essential to the statement of a cause of action (if the action is brought more than three years after the time the fraud was committed) for the plaintiff to allege that he did not discover the facts constituting the fraud until within three years immediately prior to the commencement of the action. In this case (165 Cal. at p. 596) the court said:

“The cause of action to set this aside for fraud then immediately arose, and was barred in three years from that date. The right of action upon the fraud of Osmont in procuring the decree, to the end that he might be charged as trustee, is itself barred in three years after the discovery of the fraud. The right of a party to invoke the aid of a court of equity for relief against fraud after the expiration of three years from the time the fraud was committed is an exception to the general statute and cannot be asserted unless the plaintiff brings himself within the terms of the exception. This can only be done by a showing that he did not discover the facts constituting the fraud until within the three years immediately prior to the commencement of his action. This showing is an essential element of the right of action and must be affirmatively pleaded in order to authorize the court to entertain the action.” (Citing cases)

It is not enough for plaintiff to merely allege that he did not discover the fraud until within three years. He must show the time and the circumstances under which the facts constituting the fraud were brought to his knowledge so that the court may determine whether the discovery of these facts was within the time alleged. The rule is stated as follows in the leading case of *Lady Washington C. Co. v. Wood*, 45 Pac. 809, 113 Cal. 482 at 486 as follows:

“The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the excep-

tion. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; \* \* \*

The only pretense of compliance with this requirement in the complaint is the ambiguous allegation at the end of paragraph 26 of the complaint quoted above (R. 24). That this is insufficient under the rules set out in the above cited cases is obvious, and as pointed out by the court below the complaint fails to allege that the brothers and sisters, the original heirs, did not in their lifetimes know



of the fraud or of facts which should have put them upon inquiry. As the court below said, if their rights are barred, so are those of the plaintiffs.

Insofar as the action seeks to determine title to the real property described in the various deeds referred to in the complaint, the action is clearly barred by Section 319 of the Code of Civil Procedure of California reading as follows:

“No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.”

## VI.

**THE BILL OF COMPLAINT, INsofar AS IT SOUGHT TO HAVE THE DISTRICT COURT DETERMINE WHO WERE THE HEIRS OF MARK HOPKINS OR TO HAVE IT APPOINT AN ADMINISTRATOR DE BONIS NON, FAILED TO STATE A CLAIM WITHIN THE JURISDICTION OF THAT COURT.**

It is well settled that a United States District Court has no original jurisdiction in probate matters.

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 1,  
Sec. 108 and 122;

21 American Jurisprudence, 377, 433;

*Allen v. Markham* (CCA 9th) 147 F.(2d) 136;

*Harris v. Zion Savings Bank*, 317 U.S. 447, 87 Law  
Ed. 391, 63 S.Ct. 354 at 357.

The extent of the jurisdiction of the United States District Courts in probate matters is not always too clearly drawn in the decisions due to the concurrent jurisdiction of equity and probate courts in some states. From the decisions taken as a whole the rule would seem to be as follows. While a United States District Court may entertain a suit in equity to set aside a decree of distribution on the ground that it was obtained by fraud and may sometimes entertain a suit *inter partes* by an heir against one having control of the property to establish the heir's rights therein, where by state law a probate proceeding is an *in rem* proceeding, the United States District Court has no power to entertain a proceeding to establish heirship, to appoint an administrator or to declare the validity of a will binding on the world.

*McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501,  
54 L.Ed. 762;

*O'Callaghan v. O'Brien*, 199 U.S. 89, 89 S.Ct. 119,  
50 L.Ed. 101;

*Waterman v. Canal-Louisiana Bank*, 215 U.S. 33;

*In re Broderick's Will*, 21 Wall. 503, 22 L.Ed. 599.

Probate proceedings in California are strictly statutory (Cal. Jur. Vol. 11a, p. 131). They are proceedings *in rem*, binding upon all persons and the whole world is called before the court by the giving of the statutory notices (Cal. Jur. Vol. 11a, p. 131). (*Toland v. Earl*, 129 Cal. 148, 61 Pac. 914.)

In an adversary proceeding such as this, brought by certain plaintiffs against certain named defendants, no court, least of all a United States District Court, would have the power to appoint an administrator for a decedent

who died in California leaving estate in California or to render a judgment determining who are the heirs of such a decedent. Nor could this court direct the State Court to do so, as prayed for herein (R. 47). The necessary parties are not before the court nor have they been called before the court by any form of notice. A decree determining that certain persons are the heirs must of necessity determine that all other persons are not heirs. This can only be done in a proceeding in which all other persons are in some manner called before the proper court; and, as to a decedent dying a resident of California leaving property therein, only in the manner provided in the Probate Code of California.

Appellees submit that the order of the District Court dismissing the action should be affirmed.

Dated: October 23, 1948.

Respectfully submitted,

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*Edward R. Landels*  
 LANDELS & WEIGEL,

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No. 11,990

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

ESTELLA LATTA, JONES M. GRIFFIN and  
ALVIN CHAMBERS, et al.,

*Appellants,*

vs.

WESTERN INVESTMENT COMPANY, et al.,  
*Appellees.*

**APPELLANTS' REPLY BRIEF.**

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FILED

NOV 19 1948

PAUL P. O'BRIEN,

CLERK





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No. 11,990

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

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ESTELLA LATTA, JONES M. GRIFFIN and  
ALVIN CHAMBERS, et al.,

*Appellants,*

vs.

WESTERN INVESTMENT COMPANY, et al.,

*Appellees.*

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**APPELLANTS' REPLY BRIEF.**

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**FOREWORD.**

We appreciate counsel for appellees directing our attention to an erroneous quotation on the middle of page 33 of appellants' opening brief commencing with the names *Duncan v. Superior Court*, 149 Cal. 98. This citation is not correct. We cannot at this time account for the insertion of this paragraph or of the same being quoted.

We most respectfully beg the pardon of the Court and of opposing counsel for this regrettable error.

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**STATEMENT OF THE BASIS OF ACTION.**

This action is based, upon (1) the conspiracy and fraud committed by Mary Frances Sherwood-Hopkins and Moses Hopkins at the times they filed their re-

spective petitions for letters of administration, in the methods adopted by them to prevent the heirs of Mark Hopkins residing in the State of North Carolina from receiving notice of his death, knowing that if notice was given to them of the death of their brother, they would make their relationship to the deceased known to the Court in the probate proceedings; hence their failure to state in their respective petitions for letters of administration or in the purported decree of distribution the names, ages and residences of the brothers and sisters, of the deceased, other than Moses Hopkins, together with the false statements contained in letters written by Moses Hopkins to the rightful heirs residing in North Carolina in which he informed them that Mark Hopkins died and left a wife and nine children, and on another occasion he wrote them that Mark Hopkins had died and left a will leaving all his property to him (Moses Hopkins) (Paragraphs 21, 22 R. pp. 20, 21). That by reason of the failure of Mary Frances Sherwood-Hopkins and Moses Hopkins to state in their petitions for letters of administration, or in the petition for distribution, the names, ages and residences of the brothers and sisters of Mark Hopkins, other than Moses Hopkins, the estate was wrongfully distributed to Mary Frances Sherwood-Hopkins and Moses Hopkins and their seven other brothers and sisters and their descendants were prevented from receiving any portion of the estate of Mark Hopkins to which they were entitled by law.

2. That the purported decree of distribution is void upon its face.

3. That the Court exceeded its jurisdiction in appointing Moses Hopkins administrator of the estate, he having been previously convicted of an infamous crime.

4. That the deeds described in the complaint are void upon their face.

We agree with the statements contained in the first paragraph of appellees' "Statement of the Case", but not with the statement in the second paragraph. We do not agree with statements in the second paragraph of appellees' "Statement of the Case" found on page three of appellees' brief. Commencing with the word "it" in line 6 of paragraph 2, page 3, wherein it is stated:

"It appears from the complaint itself, however, that none of the three plaintiffs are or were heirs of Mark Hopkins and that none of the persons named in Exhibit 'F' (R. 70) are or were heirs of Mark Hopkins. It is only alleged that they are descendants of brothers and sisters of Mark Hopkins, but with no allegation that they succeeded to the estate of their respective ancestors."

Par. 14 of complaint, R. 6.

We call the Court's attention to the fact that appellees have misstated the facts in reference to the allegation of plaintiff's complaint.

No such statement is contained in paragraph 14 of the complaint (R. 6), on the contrary that paragraph alleges only the names of the brothers and sisters of Mark Hopkins, deceased. To the contrary, the complaint does allege (Par. 1 of Complaint, R. 3),



“That the plaintiffs, Estella Latta, Jones M. Griffin and Alvin Chambers appear herein as plaintiffs for themselves and for all other *heirs* of Mark Hopkins, similiary situated whose names are set forth in Exhibit ‘F’ and annexed hereto and made a part hereof”.

Again in Par. 20 of Complaint (R. 20), it is alleged

“That by reason of the facts as herein alleged the brothers and sisters of said Mark Hopkins, whose descendants are the plaintiffs, were deprived of their property rights, and their vested interest in the estate of said deceased Mark Hopkins”, etc.

Again in Par. 33 of Complaint (R. 27), it is alleged,

“That each and every person whose name appears in said Exhibit ‘F’ is a legal descendant of the brothers and sisters of Mark Hopkins, that said brothers and sisters are now dead and that the persons named in said Exhibit ‘F’ *are the next of kin and collateral heirs of the aforesaid Mark Hopkins, deceased*, and are entitled to their distributive share of said estate.”

Again in Par. 46 of Complaint (R. 34), it is alleged

“That the *heirs* of Mark Hopkins as herein alleged are the lineal descendants, and are the owners of one-fifth ( $\frac{1}{5}$ ) interest in and to said real estate, and are tenants in common with said defendants”, etc.

Again in Par. 57 of Complaint (R. 41), it is alleged,

“That by reason of the premises the plaintiffs herein, direct descendants of above named

brothers and sisters of Mark Hopkins, except Moses Hopkins, are the owners of and entitled to the possession of a seven-eighths ( $\frac{7}{8}$ ) interest in and to said stocks and bonds."

Again in Par. 71 of Complaint, Sub. Sec. A (R. 46), it is alleged

"That the plaintiffs herein and the persons similarly situated whose names are set forth in Exhibit 'F' annexed to this complaint and made a part hereof, *are the heirs of Mark Hopkins, deceased*". (Emphasis ours.)

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**THE FACTS ALLEGED ARE SUFFICIENT TO STATE  
A CAUSE OF ACTION.**

The complaint alleges (Par. 11, R. 5),

"That Mark Hopkins died intestate, \* \* \* that said decedent left neither father nor mother nor issue surviving him."

And in Par. 26 (R. 23), it is alleged

"That the said Mary Frances Sherwood-Hopkins was never married to the late Mark Hopkins and was not his wife".

The complaint as above pointed out does allege that Mark Hopkins died intestate, that the brothers and sisters were his heirs at law, and that the plaintiffs are the legal descendants of the brothers and sisters of Mark Hopkins and that the brothers and sisters are now dead, and that plaintiffs are the next of kin and heirs of Mark Hopkins and entitled to the property described in the complaint. There is no necessity

for further or additional allegation as claimed by appellees.

There is no presumption the brothers and sisters of Mark Hopkins died testate. In cases of this character, if there was a will devising property to others, it would be a matter of defense.

*Miller v. Lupo*, 80 Cal. 257, 22 P. 195;

*Murphy v. Crowley*, 140 Cal. 141, 73 P. 820 at 822;

*Wilson v. Spoudamire*, 60 Cal. App. (2d) 642, 141 P. (2d) 457.

In appellants' complaint they have alleged facts which show a fiduciary relation existed between the administrator and distributees and the plaintiffs herein, therefore establishes that the order appointing Moses Hopkins administrator and the decree of distribution are void for the following reasons:

At the time letters of administration were issued in the Mark Hopkins estate, Sec. 1371 of Code of Civil Procedure quoted in appellees' brief page 20 provided that:

“Petitions for letters of administration must be in writing signed by the applicant or his counsel, and filed with the Clerk of the Court, stating the essential facts essential to give the Court jurisdiction of the case, and when known to the applicant, he *must state the names, ages and residences of the heirs of the decedent*, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proven in the course of administration, the decree or order of

administration and subsequent proceedings are not void on account of such want of jurisdictional averments.” (Emphasis ours.)

The purported decree of distribution, Exhibit “A” R. 49, shows on its face that only two persons, viz.: Mary Frances Sherwood-Hopkins, and Moses Hopkins, the administrator, had any interest in the estate and said account was settled and allowed, R. 49 and R. 145, Exhibit “A”, establishes conclusively that the names, ages and residences of James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, brothers of the deceased, and Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin, sisters of deceased, were not stated in the petition for letters of administration or proven in the course of administration. The complaint, R. 10, 21, and 27, shows that both Mary Frances Sherwood-Hopkins and Moses Hopkins well knew the names of Mark Hopkins’ brothers and sisters and their post office addresses.

This is a direct attack on the order appointing the administrator and the purported decree of distribution based on the grounds of fraud. The rule that these questions could have been raised on appeal from the order or decree is not conclusive. This was so held in *Zaremba v. Woods*, 17 Cal. App. (2d) 309, 61 P. (2d) 976 and cases here cited, where there existed a state of facts similar to those alleged in the plaintiff’s complaint, in the case at bar. In that case Woods, the executor of the estate of Zaremba, stated in his petition for probate of the will, that the deceased had no heirs, except Hugo Zaremba (as in the case at bar),



who is now living and inasmuch as he is well provided for, I make no provisions for him by this, my last will.

The extrinsic fraud relied upon by the plaintiff, in that case, as committed by the executor Woods was based upon the petition filed by him for the probate of the will of Zarembo, deceased, in which the statement appeared that the deceased left no heirs. That this statement was made for the purpose of preventing the heirs of the deceased learning of the passing of Adolph Erich Zarembo, and of the fact that he had made a will in favor of Woods. The will was admitted to probate. The plaintiff did not learn of the fact of there being a will, or of its probate until more than six months had elapsed. He acquired such knowledge upon coming to California for the purpose of visiting his brother and for the first time ascertained that his brother had died on January 31, 1933. The time having elapsed for the contest of the probate of the will, referred to, the plaintiff filed his complaint in equity, based upon the alleged extrinsic fraud of Woods in concealing the fact of the deceased having relatives, it being alleged in the complaint that the statement in the petition that the deceased died without leaving relatives, was known by Woods to be false, and was fraudulently made for the purpose of concealing the fact of the death of Adolph Erich Zarembo, and of the proceedings for the probate of the will. (Similar allegations are made by the plaintiffs in this case.) R. 8 par. 18, R. 9 and 10 Sub. Par. C, R. 19, 20, 21, 22 down to Par. 24.



The Court there said:

“The omission of stating the fact of heirs in the petition filed by Dr. Woods necessarily prevented the clerk of the court from giving the notices specified in Section 328, *supra*, to be given.

“That an action in equity will lie just as here instituted, we need cite only one case, to-wit, *Caldwell v. Taylor*, 218 Cal. 471, 23 P. (2d) 758, 88 A.L.R. 1194. This case quotes at length from the case of *U. S. v. Throckmorton*, 98 U.S. 61, 25 L. Ed. 93. The distinction between extrinsic and intrinsic fraud is there clearly defined. The “extrinsic fraud” consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding. “Intrinsic fraud” is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to receive the property of the estate. While the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same.”

*Zaremba v. Woods*, 61 P. (2d) 976.

Appellees in their reply brief cite *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965 and quote only a portion of the Court's decision, and not the decision of the Court which held to the contrary, in support of their contention that the jurisdiction of the probate Court to administer upon the estate of a decedent is not affected by the failure to name in the petition for the appointment of an administrator

or executor, the names of the heirs, even though known to the petitioner, so long as the notices provided for by statute are given. That is not the point in issue here, the plaintiffs seek to set aside the order and decree based upon the false and fraudulent statements made in the petition for letters and in the decree of distribution and in the false representations made by Moses Hopkins to the heirs. The case of *Nicholson v. Leatham* was an action to quiet title, and is readily distinguished from the case at bar. This action is brought upon the false and fraudulent statement made in the petition for letters of Administration and the decree of distribution and to the heirs of Mark Hopkins for the purpose of preventing the heirs learning either of the death of Mark Hopkins or of the proceedings instituted by Mary Frances Sherwood-Hopkins and Moses Hopkins for the Administration of the estate of Mark Hopkins, deceased. In that case the Court said:

“The rule (contended for by Appellees in this case) is absolute, *save and except in cases where there has been a breach of duty from a fiduciary relation on the part of those securing the probate of a will, that the acts alleged to constitute extrinsic fraud must be such as to operate to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against its being admitted to probate*”.  
(Emphasis ours.)

This case, together with the cases cited in the Court's opinion conclusively establishes, that the complaint in this action states a cause of action, cognizable in equity.

Appellees cite *Monk v. Morgan*, 49 C.A. 154, 192 Pac. 1046, in support of their above quoted contention. That case is cited by the Court in *Zaremba v. Woods*, above, and there distinguished from the facts of that case, and the case at bar.

The Court said:

“*Monk v. Morgan* deals only with defective notices and false testimony given in Court. The defective notice in that case was held not to deprive the Court of jurisdiction, and the perjured testimony given upon the hearing of the case was held to be intrinsic fraud. *We find nothing in the case at bar to the effect that any of the parties had connived with heirs receiving notice.*” (Emphasis ours.)

The allegations of the complaint in the case at bar, R. 18 “M”, show that Mary Frances Sherwood-Hopkins and Moses Hopkins, one of the heirs who had received notice, connived with Samuel Hopkins to defraud the other heirs of the deceased of their portion of the estate.

The Court further said in *Monk v. Morgan* cited by appellees:

The trial court has found, as we have seen, that the acts and conduct of George Morgan in relation to the sending of this remittance were undertaken with the fraudulent design on his part of concealing the fact of the death of Henrietta M. Cox and of the pending proceeding in probate for the administration of her estate from her Eastern heirs, and of thus preventing them from making their timely appearance in the probate court to contest his false and fraudulent repre-

sentations being made therein, and to claim and prove their right to receive in distribution an undivided one-half of the decedent's estate. There can be no question but that such acts and conduct on the part of the defendant herein, done with the knowledge and concurrence of his codefendant, and having the effect which they are thus found by the court to have had, would constitute extrinsic fraud within the definition of that term found in the case of *Pico v. Cohn*, *supra*, and in the long line of later decisions, most of which are above cited and which follow and restate the doctrine declared in that early case. We are therefore of the opinion that the contention of the plaintiffs in relation to the matters last above considered was sufficiently pleaded, amply proven, and correctly found by the trial court, and that the same constitutes such a sufficient showing of extrinsic fraud on the part of the defendants herein as to justify and uphold the judgment entered herein and from which this appeal has been taken.

The Judgment will therefore be affirmed.

Welch, Judge pro tem., concurs.

Waste, P. J. I concur. The defendant Morgan, as administrator of the estate of Henrietta M. Cox, deceased, occupied a trust relation towards the plaintiffs, who were entitled to share in the estate. *Robbins v. Hope*, 57 Cal. 497. Other than the plaintiffs, he and his sister, the defendant Louisa Arnold, were entitled to distribution to themselves of the whole of the estate. That was what they were seeking. Whatever they could withhold from the plaintiffs was so much gained to them. The action of Morgan, fully described in



the majority opinion, was a device intended to prevent the plaintiffs from submitting their claims to the probate court for determination. It was extrinsic fraud which entitled the plaintiffs to the intervention of a court of equity to set aside the decree, or, as is being sought here, to impress the property with a trust in plaintiffs' favor. *Bacon v. Bacon*, 150 Cal. 483, 489, 89 Pac. 317.

Appellees also cite *Beltram v. Hynes*, 40 Cal. App. 154, 192 P. 1042, in support of their contention that failing to name the names of the heirs in the petition did not constitute extrinsic fraud, however Appellees did not quote that portion of the decision which states the exception to this rule, pointed out in that very decision and in *Zaremba v. Woods* and *Monk v. Morgan*. Appellants' complaint does allege facts which bring the case clearly within the well established exceptions in all three of the cases cited by appellees.

Last 3 lines of R. 6 and first 10 lines R. 7, R. 17, R. 10 first paragraph, R. 18, 19, 20 subsection M, and particularly to the last paragraph thereof. R. 23 Par. 25, R. 24 Par. 27, R. 26 Par. 30.

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**THIS COURT HAS NOT PASSED UPON ANY OF THE  
ISSUES HERE INVOLVED.**

Appellees cite *Freeman v. Hopkins et al.*, 32 Federal (2d) 756, at page 7 of their brief. That case has no application to the facts alleged in the case at bar, in that:



1. None of the defendants in the *Freeman* case are defendants in the instant case. It is a well settled principle of law that only parties to a former action can plead res adjudicata.

2. The subject matter is different. None of the property involved in that case is involved in this case. The Court said in the *Freeman* case, page 756:

“The object of the suit was to establish a trust in securities of great value which it was charged were the property of Mark Hopkins, at the time of his death and which are presently in possession of the defendant Banks, generally it is alleged that the securities were fraudulently concealed from the knowledge of the court in the probate proceedings by the deceased widow and his brother Moses Hopkins.”

There is no obligation in the instant case as to any trust fund alleged to be held by any banks and they are not parties in this action.

At page 757 the Court said:

“In passing it may be added that plaintiff is here claiming no interest in the real property of which the decedent was possessed and hence we are not concerned with the validity of either the agreement or deed referred to, or that part of the decree of distribution.”

3. In the *Freeman* case the Court said:

“The plaintiff failed to allege a cause of action in that it failed to allege lack of notice, extrinsic fraud, that the order directing it was erroneous or defective in any particular, that the ancestress did not appear, that such failure was due to any

act or omission on the part of the administrator or the beneficiaries.”

The Court further said, at page 758:

“In the absence of extrinsic fraud of a material character, generally a decree of distribution made by a probate court having jurisdiction constitutes an adjudication in rem and is binding upon all the world. There is no question of jurisdiction.”

In the case at bar, the plaintiffs are claiming an interest in real property, as well as other property, and allege facts establishing extrinsic fraud: That the order directing the distribution was defective, that the Court was without jurisdiction to distribute the property, in that, the order appointing the administrator was void by reason of the administrator having previously been convicted of an infamous crime and other reasons heretofore set out. That the ancestors of plaintiffs did not appear and that such failure was due to the fraudulent acts of the administrator. That the ancestors of plaintiffs had no knowledge of the fraud, that plaintiffs had no knowledge of the fraud until 1945, and the plaintiffs in this action ask for relief from the deed referred to in the complaint and made a part thereof.

We therefore submit that the decision in the *Freeman* case is not in any wise controlling in this case, and is not res adjudicata.

**ADMINISTRATOR'S CONVICTION OF AN INFAMOUS CRIME.**

Answering Appellees' Brief, page 30, in which they state that lack of capacity of administrator is not an allegation of fraud and comes too late, Appellants do not contend that this was extrinsic fraud but do contend that the Court lacked jurisdiction to appoint any person as administrator who had been convicted of an infamous crime under Section 1369, Code of Civil Procedure in effect in 1881 at the time Moses Hopkins filed his Petition for Administration and received the purported appointment and letters, which section prohibited the appointment as administrator of a person convicted of an infamous crime, and that the purported appointment was in excess of the jurisdiction of the Court and void. That in law and in fact Moses Hopkins never was an Administrator of the Estate of Mark Hopkins. We covered this question in our opening brief commencing with page 16 thereof to and including the first paragraph on page 24. The authorities cited by Appellees have no application to the fact alleged in Plaintiffs' Complaint wherein it is alleged that Moses Hopkins had been previously convicted of an infamous crime in North Carolina in 1845. (Record pages 80 and 81.)

The authorities cited by Appellants in their opening brief hold that in such a situation, viz: The appointment of a person who has previously been convicted of an infamous crime, is void; that the Court in attempting to appoint such a person exceeded its jurisdiction and that in a case where the Court granting letters of administration has exceeded its jurisdiction

the acts done by such Court and Administrator are absolutely void, irrespective of lapse of time.

The authorities cited and quoted by Appellees are cases where the Court had jurisdiction. That is recognized in Appellees' first quotation from 1 Bancroft's Probate Practice, Section 277, pp. 529, 530, where it is said:

"It is also settled beyond controversy that if the Probate Court had jurisdiction to appoint some one representative, the fact that it erred in selecting an appointee does not make its appointment subject to collateral attack."

This quotation sustains Appellants' contention. It shows that the rule contended for by Appellees applies only *if* the Court has jurisdiction to appoint such person Administrator.

"Probate Proceedings being purely statutory, are therefore special in their nature. The Superior Court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided." *Texas Co. v. Bank of America*, 5 Cal. (2d) p. 35 at 39, citing *Smith v. Westerfield*, 88 Cal. 374, 379, 26 Pac. 206; *Estate of Strong*, 119 Cal. 363 at 366, 51 Pac. 1078.

Although jurisdiction over the subject matter of the estate authorized the appointment of an Administrator, yet, since various provisions of the Code of Civil Procedure provided the exclusive method for the ex-



ercise of such authority, an appointment contrary to the applicable provisions would be in excess of the Court's jurisdiction.

*Texas Co. v. Bank of America*, above.

To validate the void appointment of the Administrator Appellees rely upon Section 1428 C.C.P. as it read up to the time of the adoption of the Probate Code in 1931 quoted on page 33 of Appellees' Brief, viz., that

"All acts of Executor, etc., valid until his power is revoked. All acts of an Executor or Administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust."

That section refers to an Executor or Administrator who has been duly appointed and qualified to act, to one the Court had jurisdiction to appoint, but not to one that by statute the Court did not have jurisdiction to appoint.

*Monk v. Morgan*, 49 Cal. App. 154, 159, 192 Pac. 1042;

*Texas Co. v. Bank of America*, 5 Cal. (2d) 35.

In *Pryor v. Downey*, 50 Cal. 388 at 398, the Supreme Court expressed the opinion that the words "'defects of form, omissions, or errors,' as used in the Act of April 2, 1866, validating Probate sales of realty, did not embrace a want of power in the person assuming to act as administrator or, in the absence of jurisdiction in the Court which ordered the sale."



The Supreme Court of Oregon reached the same conclusion in *Browne v. Coleman*, 125 Pac. 278 at 281.

In *Caminetti v. Imperial Mut. L. Ins. Co.*, 59 Cal. App. (2d) 476 at 492, the Court said:

“This being a special proceeding the Jurisdiction of the Court is limited by the terms and conditions of the statute under which the proceeding is instituted.”

The *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825, relating to presumptions, has no application to this cause of action. Appellants are not relying upon any presumption to establish the record of the conviction of Moses Hopkins of the crime of grand larceny, an infamous crime, and neither Appellants nor Appellees make any claim that the record of such conviction has been destroyed by fire or otherwise.

In the case of *Haug v. Primean*, 57 N.W. 25, where the person appointed was not one permitted to be appointed under the Michigan statutes the Court said at page 26:

“the petitioner was not the grantee of the interest of the widow or mother of the deceased nor does it appear that he was requested by the next of kin, or the grantee of the interest of one or more of them to petition for administration. He was not a creditor of the estate or in any way interested in it. The petition on its face did not confer jurisdiction upon the Court to grant letters of administration to the petitioner or any other person. It follows that the order of sale of property was void.”

“Some question is raised by the defendant that the suit in equity could not be maintained as it was a collateral attack upon the proceedings. This point is not well taken. The conveyance made by the Administrator is a cloud upon Complainant’s title, and she, being the owner of an undivided half interest has the right to invoke the aid of a Court of Chancery to remove the cloud.”

The note in 14 A.L.R. page 619 et seq. does not sustain Appellees’ contention that the appointment of a person prohibited by statute, viz., convicted of an infamous crime, is valid. On the contrary that section cites *Knox v. Noble*, 28 N.W. 355, 27 N. Y. Supp. 206, quoted in Appellants’ opening brief at page 19, in which the Court said:

“The statute expressly prohibits the granting of letters to a person convicted of an infamous crime. \* \* \* Can it be said that the surrogate by his ipse dixit, can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed Administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that a judicial officer can by his mere will override the express prohibition of the statute.

“The right of the surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void.”

2 Baneroff Probate Practice Sec. 337, pp. 643-644, cited by Appellees in support of their contention, has

no application to the facts of this case. That section refers to case where there was "*merely because of some defect in the procedure,*" and not to any case where the Court *exceeded* its jurisdiction in making the appointment. (Emphasis ours.)

In conclusion, we direct the Court's attention to the fact that Appellees have not directed the attention of the Court nor counsel to any case in any jurisdiction where it has ever been held that the appointment of one, previously convicted of an infamous crime, as administrator, where such appointment is prohibited by statute, is not in excess of the jurisdiction of the Court and void.

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#### DESCRIPTION OF PROPERTY.

##### ANSWERING APPELLEES' BRIEF COMMENCING ON PAGE 36.

In which it is stated that the decree of distribution and deed contain good and sufficient description of the real estate involved.

We refer the Court to the title commencing on page 48 of Appellants' brief and the authorities therein cited.

On page 37 of Appellees' brief, it is stated that the "Bill of Complaint fails to state a cause of action, 1. because it does not appear that Plaintiffs have any remedial interest in or claim to any property of any kind owned by Mark Hopkins."

In answer to this statement we refer the Court to par. 1, Complaint, R. 3 and Par. 20 Complaint R. 20, par. 33 of Complaint R. 27, par. 46 of Complaint, R. 34,

par. 57 of Complaint, R. 41 and par. 71 of Complaint, Sub. A. R. 46, wherein it is alleged that Plaintiffs had a remedial interest in and claim to property owned by Mark Hopkins at the time of his death.

Secondly: Insofar as the action is based on the alleged frauds perpetrated by Mary Frances Sherwood-Hopkins and Moses Hopkins, facts are alleged in the Complaint of which the Defendants had constructive notice under Sec. 1213, Civil Code, which presumption of knowledge is made conclusive and incontrovertible and there is no need of actual knowledge, 22 Cal. Jur. 616, Sec. 29, and cases cited.

Thirdly: Appellees contend that even if the Complaint showed that Plaintiffs had any interest, and even if it showed that Defendants took with knowledge of the fraud, the Complaint does not set forth facts establishing extrinsic fraud in the procurement of the decree sufficient under the decisions of the California Supreme Court or of this Court, to warrant interposition of a Court of Equity. We have fully answered this contention of Appellees under the title "Extrinsic Fraud" and need not repeat here, but refer the Court to the subject "Extrinsic Fraud" found on page 35 of Appellants' opening brief and to the same subject in this reply brief.

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#### PARTIAL DISTRIBUTION.

Answering Appellees' claim that the decree of distribution of November 1, 1883, was a decree of final not partial distribution (p. 33, Appellees' Brief). Ap-



pellees apparently base their claim upon the provision of the omnibus clause quoted by them on page 34 of their brief, wherein the account of the administrator is settled, allowed and approved and that the residue of the estate hereinafter particularly described and any other property not now known or discovered which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, etc. We direct the Court's attention to the language of this omnibus clause. It does not contain the usual provisions contained in an omnibus clause, viz., "and any other property *known or unknown* or hereafter discovered which may belong to said estate." The omnibus clause in the purported decree in question only attempted to distribute "any other property *not now known or discovered*," which may belong to said estate or in which said estate may have any interest." This clearly shows that the sum of \$816.00, which was known and accounted for as shown by the purported decree of distribution was not distributed by said omnibus clause, and remained in the hands of the purported administrator. Therefore it follows that the estate of Mark Hopkins has never been fully administered and the Decree is a partial and not a final Decree of Distribution.

Since it is a partial Decree of Distribution made upon the petition of the administrator it is void, as shown by the authorities cited by Appellants' opening brief, pages 42, 43. That a Decree of Partial Distribution granted upon the petition of the Administrator, under the law in force at the time of the probating



of Mark Hopkins' estate is void, has not been challenged by learned opposing counsel.

“It is not what the paper is named, but what it is, that fixes the character of a pleading.”

21 Cal. Jur. page 58, sec. 34.

“It is not what a pleading is called, but the facts which it sets up, that determines its character.”

*McDougal v. Hulett*, 64 Pac. 278 at 280; 132 Cal. 154.

“The character of a document or of a transaction cannot be made to depend upon misnomer but it must be determined from facts.”

*Stephen v. Lagerovest*, 199 Pac. 52 at 54, 52 Cal. App. 519.

It is to be noted also that not only the \$816.00 appearing on the face of the purported decree was not distributed, but real and personal property aggregating millions of dollars as alleged in Appellant's Complaint, was known and in the possession of the Administratrix and of the succeeding Administrator, as alleged in par. 19 sub. “G” pages 12 to 15 R. and deeds Ex. “C” and “D” pages 55 and 61 et seq. R. was not referred to nor distributed in said purported decree, and could not pass under the omnibus clause of the decree.

The Act of June 16, 1906 (Statutes 1906 Ex-Session p. 73) cited by Appellees at page 35 of their Brief has no application to the facts alleged in Plaintiffs' Complaint, it only provides a method for the restora-

tion of burned records, and Plaintiffs are not asking for the restoration of any burned or destroyed records.

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#### VOID DEEDS AND CONVEYANCES.

Replying to Appellees point B, page 12 of Appellees' Brief, we refer to subject Void Deeds, page 24 of our opening Brief and said Deeds referred to in par. 43, 49, 50 of complaint, R. 33, 36, and 37, and the authorities therein cited, we here cite additional authorities in support of Appellants' contention that the deeds marked Ex. B, C and D set out in plaintiffs complaint 53, 55, 61 and made a part thereof were and are void.

Section 1517 Code of Civil of Procedure of California, Chapter VII, in 1879 was as follows:

"No sale of any property of an estate of a decedent is valid unless made under order of the Probate Court, except as otherwise provided in this Chapter. All sales must be under oath reported to and confirmed by the court before the title to the property passes."

In 1880 this section was amended (1) in the first sentence substituting the word "Superior" for "Probate"; (2) in second sentence (a) changing "reported under oath" to "under oath reported to" and (b) omitting "Probate" before "Court".

C.C.P. sec. 1536:

"When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or

legacies, the executor or administrator may also sell any real, as well as personal property of the estate for that purpose, upon the order of the probate court; and an application for the sale of real property may also embrace the sale of personal property.”

C.C.P. sec. 1524 (former section) read:

“Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.”

C.C.P. sec. 1525. Enacted March 11, 1872, and then read:

“If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, the court or judge must so direct; and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family

allowance until all other personal estate has been applied to the payment thereof.”

The sections above set out were in effect during and at the times all the Deeds “Ex B, C and D” were executed and recorded and the personal property sold and included in “Ex. C” Sales of Personal Property. Sections 1522, 1523 and 1524 at that time also required confirmation by the Court.

The complaint alleges, R. 33, Par. 43, R. 36, Par. 49 and R. 37, Par. 50, that said deeds were made without any order on confirmation of the Court, and the receipts therefrom were not accounted for in the purported decree of distribution.

The deed “Ex B” was executed by Moses Hopkins and Samuel Hopkins to Mary Frances Sherwood-Hopkins while she was acting as Administratrix of the Estate of Mark Hopkins, deceased. Samuel Hopkins was not an heir and had no interest in the property of the estate of Mark Hopkins.

Deed “Ex C” was executed by Moses Hopkins, Mary Frances Sherwood-Hopkins and Samuel Hopkins to Collis P. Huntington, et al., while Mary Frances Sherwood-Hopkins was acting as Administratrix, but signed individually by her, and not as Administratrix.

Deed “Ex D” was executed by Mary Frances Sherwood-Hopkins, Samuel F. Hopkins and Moses Hopkins et al. to Ione Coal and Iron Co., during the time Mary Frances Sherwood-Hopkins was acting as Administratrix, and signed individually by her, and not as Administratrix.



Section 1576 of the Code of Civil Procedure, in effect at the time of the execution of the deed to Mary Frances Sherwood-Hopkins "Ex. B" of a  $\frac{1}{4}$  of all real property belonging to the estate of Mark Hopkins was as follows:

Enacted March 11, 1872; based on Probate Act 1851, Sec. 193, which read: "No executor or administrator shall directly or indirectly purchase any property of the estate he represented."

Section 1517 of the Code of Civil Procedure above quoted having provided that no sale of any property of an estate of a deceased person shall be valid, unless made under order of the Probate Court (or later Superior Court) the deeds set out in exhibits "B", "C" and "D" were invalid and void.

"Sale or Deed Without Authority—Formerly, in California, no sale of any property of the estate of a decedent was valid unless made under order of the probate court, except as otherwise provided, such as in the case of sales under a power conferred by will, and no title passed until the sale was confirmed by the court. Authority for the sale or transfer of property of the estate was required to be found in the records of the court, and a sale without authority was wholly void. So also no conveyance could be made without an order of court confirming the sale and directing such conveyance. Where the administrator took no proceedings and obtained no order to convey the property, his deed was without authority and void. A representative who sold or disposed of personal property belonging to the estate, which he believed worthless, without authority,



was guilty of conversion and liable to the estate for its value with legal interest.

Under the present system, no order directing a sale is required, but, as under the former provisions, no title passes until the sale is confirmed by the court. If an executor or administrator without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs. Although a conveyance under authority of special legislative act may be unavailing to transfer any title to the lands so conveyed, the deed may nevertheless be sufficient to give color of title in support of an entry on the property."

11 Cal. Juris. p. 832, sec. 494.

In *Wells Fargo & Co. v. McCarthy*, 5 Cal. App. 301, 90 Pac. 203, the Court said:

"In this connection it is contended that the allegation of the execution of the assignment by the executrix is not sufficient because such execution by the executrix in the absence of an order of confirmation conveys no title. This doctrine is clearly established and must follow from the provisions of said section 1517, Code of Civil Procedure, and it has been so declared by the Supreme Court in *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920: 'No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court. Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate.' See also, Wick-

ersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162.”

11 B *Cal. Juris.*, Sec. 684-685-686;

*Huse v. Den*, 54 Cal. 21;

*Huse v. Den*, 85 Cal. 390, 24 Pacific 790.

#### NOTICE TO DEFENDANTS.

As stated above and alleged in the complaint, the deed from Moses and Samuel to Mary Frances, Ex B, while Mary Frances was acting as Administratrix purporting to convey  $\frac{3}{4}$  of the property of the estate was in violation of Sec. 1517 Code of Civil Procedure, above cited, also for lack of description is void, said deed being of record in all the counties where the deceased had real estate. Also the deed from Mary, Moses and Samuel to Huntington et al., Ex. C, while Mary was acting as Administratrix signed by her individually and not as Administratrix, executed April 5, 1879, (there is no authority shown on the face of the deed giving the said Administratrix authority to execute said deed; and made without an order or confirmation of the Probate Court) is void. It could convey only such interest as they had, and did not affect the interest of the other heirs at law—the grantees in said deed had notice of these facts, and the deed being on record in the counties where the property was located was and is notice to the world.

The same applies to the deed from Mary, Samuel and Moses, et al. to the Lone Coal & Iron Co. Ex “D”

executed January 16, 1880. That Huntington-Stanford and Crocker, partners and associates in business knew the facts and circumstances of the business affairs of the deceased, Mark Hopkins and knew the parties with whom they were dealing and knew or should have known the circumstances under which they were dealing with Administratrix, and had constructive notice that Mary Frances S. Hopkins was Administratrix of the Mark Hopkins estate and had no authority to sell anything belonging to the estate of Mark Hopkins, without first obtaining an order authorizing such sale and that no title passed until such sale was confirmed by the Court, and that said deeds contained no authority granting the Administratrix power to convey the property of the estate, and that the grantors could only convey such interest as they had in the property. Also the purported decree of distribution that the complaint alleged is void on its face was of record in all the counties where the deceased had real estate, and was notice to the defendants as well as their predecessors in title.

That the facts above stated and as shown by the instruments mentioned was in violation of Section 1517 of the Code of Civil Procedure above cited.

Section 1554 of the Code of Civil Procedure, in effect at the dates of said deeds, read as follows:

“If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate that a greater sum, as above specified cannot be obtained, or if the advance bid mentioned in Sec.

169 of this Act, be made and accepted by the court, the court shall make an order confirming the sale and directing conveyances to be executed, and such sale, from that time, shall be confirmed and valid, and a certified copy of the order authorizing the sale, and of the order confirming the same and directing conveyances to be executed, shall be recorded in the office of the recorder of the county within which the land sold is situated."

Sec. 1555, Code of Civil Procedure, in effect at the time said deeds were executed and recorded read as follows:

"Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances."

The grantees in said deeds Ex "B, C and D", R. 53-55 and 61 and their grantees and successors had



notice of the invalidity of said deeds by reason of the failure of said deeds to contain the provisions required by the statute viz: The failure of said deeds to refer to the orders of the Court confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the County Recorder, either by the date of such recording, or by the date, volume and page of the record. Civil Code, Sec. 19 in effect at the time said deeds were executed and recorded, read as follows:

“Every person who has actual notice of circumstance sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself. In all cases in which, by prosecuting such inquiry, he might have learned such facts.”

Means of knowledge, especially where it consists of public records, is deemed in law to be knowledge. *Wheaton v. Nalan*, 3 Cal. App. (2d) 401, 39 P. (2d) 457; *Bowman v. Bowman*, 125 Cal. App. 602, 13 P. (2d) 1049.

The confirmation intended is such a one as is made after a return has been filed, and the parties in interest have had an opportunity to file objections and to be heard thereon. The allowance and approval of the account of the representative, charging him with money received upon the sale, do not amount to a confirmation of the sale; nor does an order in the decree of distribution to the effect that all acts and proceedings, as reported to the Court and as appear upon



the record, shall be approved and confirmed, amount to a confirmation within the meaning of the Code.

11B *Cal. Jur.* p. 147, Sec. 752;

*Estate of Delaney*, 49 Cal. 76 decided under the old law in force 1878.

A sale which is void cannot be confirmed. Such a sale cannot be made valid and binding by any number of so-called confirmations.

*Miller v. Sup. Court*, 82 Cal. App. 643, 258 P. 614.

Under former law see *Estate of Devincenzi*, 131 Cal. 452, 63 P. 723. Same case—119 Cal. 498, 51 P. 845.

11B *Cal. Jur.* p. 150, Sec. 755.

Every person is conclusively charged with notice of all parts of statutes of the State.

20 *Cal. Jur.* p. 241, Sec. 9.

Sec. 1213, Civil Code provides that every conveyance of real property acknowledged and proved and certified and recorded as prescribed by law from the time it is filed with the Recorder for record is constructive notice of its contents, to subsequent purchasers and mortgagers. The record of an instrument is constructive notice of the contents thereof to subsequent purchases and mortgages. This presumption of knowledge is conclusive and incontrovertible, and there is no need of actual knowledge.

Civil Code Sec. 18 and 19;

*Fair v. Stevenot*, 29 Cal. 486;

*Anderson v. Wilson*, 48 Cal. App. 289, 191 P. 1016.

One subsequently purchasing from vendor is not an innocent purchaser.

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#### FACTS ALLEGED CONSTITUTE EXTRINSIC FRAUD.

Answering paragraph C, page 15, Appellees' Brief. Appellees' contention that appellants' complaint alleges fraudulent acts amounting to intrinsic fraud. We refer to the authorities heretofore cited in our opening brief, page 35 particularly to *Sohler v. Sohler*, 135 Cal. 323, 67 P. 282 cited by Appellees p. 13 of Brief as the leading case from which Appellees again cite the general rule as given by the Court, viz:

that intrinsic fraud, fraud by which a decree or judgment is obtained by false evidence upon issues within the case is not such fraud as equity will relieve against.

All of which Appellants concede. But Appellees fail to quote or call the attention of the Court to that portion of the decision in which the Court said "But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. (See Appellant's Opening Brief, page 37.)

The Appellee from that portion of this case quoted by them apparently attempted to lead the Court to believe that the facts stated in the complaint in the *Sohler* case, above quoted, did not state facts sufficient to warrant equitable relief, that the facts alleged constituted only intrinsic fraud, but the decision of

the Court is contrary to what Appellees apparently would have the Court believe. The Court held that the facts alleged did constitute extrinsic fraud.

Appellants agree with the rule in *Gole v. Witt* quoted on p. 16 of Appellees' Brief, where Appellees state, this is the most recent decision in California on this point. However, we do not agree with them in their application of that case to the facts alleged in Appellants' complaint. Quoting from Appellees' Brief, it is stated:

(1) "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination."

With this we agree. Appellees then propound this amazing question. Now, what facts do plaintiffs allege which could possibly constitute extrinsic fraud perpetrated in procuring the decree. (See par. 15, 17 and 19 Sub. Sec. C R. 8 and 9.) In answering this question we first call the Court's attention to Sec. 1572 of the Civil Code which defines actual fraud, and particularly to subdivision three thereof, which reads as follows: "The suppression of that which is true, by one having knowledge or belief of the facts."

1. In par. 14 of the Complaint R.6, it is alleged, "that at the time of filing by Mary Frances Sherwood-Hopkins of her application for letters of administration, said applicant well knew the names and addresses of the heirs; and that said applicant willfully, knowingly and with in-

tent to defraud said lawful heirs, and to deceive the Honorable Superior Court, \* \* \* *concealed* from said Court and from the Clerk and the Court thereof the names and addresses of the brothers and sisters of Mark Hopkins.”

2. In par. 17 of the Complaint R.8 the same facts are alleged in reference to the time Moses Hopkins filed his petition for letters of administration, and that said heirs received no notice thereof directly or indirectly and never knew of said hearing.

3. Last 10 lines of par. 19 Sub. Sec. C of Complaint, R.10, it is alleged:

“Moses Hopkins, said Administrator, well knew the names of his brothers and sisters, the legal heirs of Mark Hopkins, deceased, and their Post Office addresses, and said statements and misrepresentations was a fraud upon the court and upon said heirs, conceived and perpetrated by Moses Hopkins and Mary Frances Sherwood-Hopkins who were acting in a fiduciary capacity at that time for the purpose of depriving said heirs of their rightful inheritance.”

4. The reporting of property, not in existence, as assets of the estate of Mark Hopkins, deceased, and the failure to report or account for property appraised at \$24,940,597.29 by appraisers appointed by the Court, par. 19 Sub. Sec. F and G R. 12, 13, 14 and 15.

5. All of par. 19 Sub. Sec. M of Complaint, commencing on p. 12, R.18 and par. 20 of the Complaint R.20.

6. All of paragraph 24 of complaint R.22.



7. All of par. 26 of Complaint, R.23 alleging the conspiracy between Mary Frances Sherwood-Hopkins, not the wife of Mark Hopkins, and Moses Hopkins.

8. All of par. 27 of Complaint, R. 24.

9. All of pars. 49 and 50 of Complaint R.36 and 37.

All of the facts alleged in the paragraphs above enumerated, are allegations of extrinsic fraud, and not allegations of intrinsic fraud, and were of such a character as prevented a trial of the issues presented to the Court for determination.

As was said in *Zaremba v. Woods*, 61 P. (2d) at p. 979:

“Moreover, from the relations between Dr. Woods and the decedent I am further convinced that Dr. Woods knew at the time he made that statement to the clerk or stenographer of his attorney in this case, that the full brother of the decedent was living in Chicago, Illinois, and that if notice was given to him in any way of the death of his brother he would doubtless come to California and resist the probate of the will leaving all of the property to Dr. Woods, and hence that this false statement was made by Dr. Woods to the stenographer of his attorney in this case with the intent and purpose of thereby preventing the full brother of decedent from receiving notice of his death, and from having his day in Court in opposition to the probate of the aforesaid will. As a matter of law it seems to me, therefore, that Dr. Woods was guilty of extrinsic fraud upon the full brother of the decedent and upon the probate court of this state and county, and thereby prevented said full brother, the plain-



tiff in this case, from having his day in court in opposition to the probate of said will, because, said brother did not learn about the death of his brother until after the expiration of one year after the date of probate."

We direct the Court's attention to the case of *Caldwell v. Taylor*, 218 Cal. 471, 23 Pac. (2d) 758, which we believe is the leading case in this state on what constitutes the distinction between extrinsic and intrinsic fraud, citing and quoting from the case of *U.S. v. Throckmorton*, 98 U.S. 61, 25 L. Ed. 93. Where the distinction between extrinsic and intrinsic fraud is clearly defined. The Court said:

"The extrinsic fraud consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding."

"Intrinsic fraud" is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to recover the property.

"Where the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same."

In this case Appellants are not asking for relief from any perjured testimony given at the trial, but from acts of deception practiced by Mary Frances Sherwood-Hopkins, and Moses Hopkins in keeping the Appellants and their predecessors in interest, the

heirs of Mark Hopkins in ignorance of the proceedings, and in concealing from the Court and the heirs millions of dollars worth of property belonging to the estate of Mark Hopkins, deceased.

Appellants' statement of the holding of the Court in *Wyant v. Utah Savings and Trust Co.*, 54 Utah 181, 182 P. 189 is incomplete and deceptive, in that Appellees failed to state that the Court held that the Administratrix in that case,

“utterly failed to make and return a true and complete inventory of the property belonging to the estate. Again she converted to her own use about \$12,000.00 worth of property of the estate without making an inventory thereof, and without disclosing its existence. That act alone constituted an insufferable fraud. \* \* \* Moreover, all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate, and not after the decree of distribution had been entered. \* \* \* True, she was awarded possession and control of the property which was inventoried, and which was left for distribution, by the decree of distribution; but that decree was directly based upon *extrinsic* fraud practiced by her.” (Emphasis ours.)

The statement of facts above set forth and which the Court held constituted extrinsic fraud, are almost identical with the facts alleged in Appellants' Complaint, R. 12 “G”, and in Par. 19 Sub. Sec. M of Appellants' Complaint, R. 18, 19, 20.

That the agreement entered into by Moses, Samuel and Mary Frances Sherwood-Hopkins alleged in Par.

19 Sub. Sec. H, R. 15 and the decree, Ex "A" R. 52, wherein it was agreed on the 4th day of September, 1879 that upon the final settlement of *said* Estate the Court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said estate to said Mary Frances Sherwood-Hopkins.

This agreement constituted extrinsic fraud, and vitiates the decree of distribution to such an extent that it is void on its face.

The real estate referred to in this agreement as belonging to the estate of Mark Hopkins, was never inventoried or accounted for in the estate, and such agreement is conclusive evidence of a conspiracy on the part of Mary Frances and Moses Hopkins to deceive the Court and to defraud the rightful heirs of their inheritance.

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**ALLEGATIONS IN COMPLAINT SHOW DECREE VOID  
ON THE FACE.**

Answering Par. D pp. 25 and 26 of Appellees' Brief.

On page 26, Appellees' Brief, it states:

"It is true that the decree does not specifically find who are the heirs, but it does purport to distribute the property to the persons which the court found entitled thereto and that is all that was then required by Sec. 1666 of the Cal. Code of Civil Procedure."

Nowhere in the decree did the Court find who was entitled to the estate of Mark Hopkins, it only found (R. 49):

*“and Mrs. Mary Frances Sherwood-Hopkins, the only person interested in said estate, except said administrator, having filed her consent in writing that said account may be settled and allowed”.*

And on R. 59:

*“and it appearing to the court that the said parties in interest, to-wit: Mary Frances Sherwood Hopkins and said Moses Hopkins have agreed in writing.”* (Emphasis ours.)

R. 52:

*“and it further appearing to the court that the parties interested in said estate on the 4th day of September A.D. 1879 to-wit: Mary Frances Sherwood-Hopkins, Moses Hopkins and Samuel Hopkins whose interest in said estate has since been acquired by Moses Hopkins, did, on said day, enter into an agreement, in writing, wherein it was agreed among other things that upon the final settlement of said estate the court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said estate to said Mary Frances Sherwood-Hopkins.” \* \* \** *“It is further ordered adjudged and decreed that the entire amount of said real estate of which the said Mark Hopkins died seized and possessed, and in which the said estate has any right, title or interest, be and the same is hereby set aside and distributed to Mary Frances Sherwood Hopkins, widow of said deceased and the said conveyance from Moses Hopkins and Samuel Hopkins to*



Mary Frances Sherwood, widow of said deceased, is hereby approved and confirmed.”

There is not one word in the decree of distribution in which the Court named the persons and the proportions or parts to which each was entitled under the law.

The decree of distribution is based solely upon the consent of Mary Frances Sherwood Hopkins in writing that said account may be settled and allowed (R. 49) and by the agreement in writing executed by Mary Frances Sherwood Hopkins, Moses Hopkins and Samuel Hopkins, by which they agreed that the Court may by its final decree distribute the entire amount of the real estate belonging to said estate to Mary Frances Sherwood Hopkins. There is not one word in the decree where the Court found who were the heirs entitled to the estate of Mark Hopkins, deceased. Consent of parties cannot confer jurisdiction.

Appellees cite *Miller v. Pitman*, 180 Cal. 540, 182 Pac. 50, in support of their contention. But they did not quote that portion of the opinion of the Court in that case which reads:

“But we do not wish to be understood as holding that the plaintiffs in the presence of the potential equity of their case are without remedy. Therefore, we are constrained to say that, if time has not confirmed a wrong, the plaintiff case might very readily be made to proceed through the medium of appropriate pleadings upon the equitable theory which, while recognizing, as a matter of law, the finality of the decree as a muniment



of title in the defendant, nevertheless impresses such title with an involuntary trust in favor of the plaintiff by reason of extrinsic fraud or mistake superinduced by such fraud, in the procurement of the decree coupled with a breach of a fiduciary relationship."

### Citing

*Estate of Walker*, 160 C. 547, 117 P. 510, 36 L.R.A. (NS) 89.

Distribution of three-fourths of the personal property and all of the real estate to Mary Frances Sherwood Hopkins was improper and in excess of the jurisdiction of the Court. Section 1402 and Section 1386 of the Civil Code in effect at the time of the death of Mark Hopkins, as quoted by Appellees is correct, and under these sections the Court had jurisdiction to distribute only one-half of the estate to Mary Frances Sherwood Hopkins, if she was the wife of Mark Hopkins at the time of his death, if the estate was separate property of deceased. The estate of a decedent vests in the heirs at the time of his death.

Section 1386 of the Civil Code as amended in 1880, quoted by Appellees on page 29 of their brief, could not under any circumstances affect the right of the heirs of Mark Hopkins, or enlarge the share of a wife whose husband died prior to the amendment of 1883, quoted by Appellees.

*In re Young's Estate*, 215 C. 127, 1 P. (2d) 523. *In re Rattray's Estate*, 13 C. (2d) 702, 91 P. (2d) 1042. *In re Hutman's Estate*, 219 Cal. 608, 28 P. (2d)

Only one-half could have been distributed to the wife under either section quoted. The decree shows on its face that it did not distribute all the property reported in the hands of the Administrator, to-wit: \$816.00 cash on hand (Par. 19, subsec. D, R. 10) and therefore was a decree of partial distribution, and it also failed to describe any of the real estate and failed to find that said property was acquired after marriage, or that it was community property and based its distribution thereof, solely on an agreement of the parties, all of which was contrary to law, and in excess of the Court's jurisdiction.

In California the presumption that all property acquired *after marriage* (except that acquired by a married woman, or by a married woman and another by an instrument in writing) is community property, is not applicable to this decree, there being no finding that it was acquired either after marriage or that it was community property.

Section 164 of Civil Code, at the time of the death of Mark Hopkins, read:

“All other property acquired *after marriage* by either husband or wife, or both is community property”.

This decree did not find that the property was acquired after their marriage, or when they were married, or that the person to whom it was distributed was married at all.

The purported decree of distribution purported to set out and describe the residue of the estate (Par.

19, Sub. Sec. "F", R. 11 of the Complaint) as the property belonging to said estate, but failed to appportion the property to the purported distributees as required by the statute.

If Mary Frances Sherwood Hopkins was the wife of the deceased she was only entitled to  $\frac{1}{2}$  of the estate under either Section 1402 or Section 1386, Par. 2 of the Civil Code quoted in Appellees' Brief, page 28. It is alleged in the complaint (Par. 26, R. 23) that Mary Frances Sherwood Hopkins was not the wife of Mark Hopkins, which is admitted by Appellees on this motion, but assuming that she was the wife of Mark Hopkins, as stated in the decree, then the Court exceeded its jurisdiction in distributing to her all the real property, based solely upon the agreement between Moses and Samuel Hopkins, and Mary Frances Sherwood Hopkins (R. 52), by the terms of which Moses Hopkins and Samuel Hopkins entered into an agreement, in writing, that upon the final settlement of said estate the Court shall and may by final decree distribute the entire amount of the real estate belonging to said estate to Mary Frances Sherwood Hopkins, there being no finding that either Moses Hopkins or Samuel Hopkins was an heir of Mark Hopkins.

By way of illustration, Mary Frances Sherwood Hopkins might have gone out on the highway and obtained the signature of Sam Jones and Sam Smith, strangers to the estate of Mark Hopkins, to such an agreement, and ask the Court based upon said agreement, to distribute all of the estate to her.

In the absence of a finding in the decree that Sam Jones and Sam Smith were heirs of Mark Hopkins, the decree distributing the property based upon such an agreement entered into by strangers would be void and in excess of the Court's jurisdiction.

Section 1666, Code of Civil Procedure in effect at the death of Mark Hopkins, provided:

“In its decree the court must name the persons and the proportions or parts to which each is entitled”.

This section must be read in conjunction with Sections 1402 and 1386, paragraph 2 of the Civil Code which defines the persons who are entitled to have the estate distributed to them, and in the absence of a finding in the decree of the names of the persons who are entitled to receive the estate of the deceased and the parts to which they are entitled, the decree is in excess of jurisdiction and void. It is no decree at all, it does not name the persons and proportion which Section 1666 made mandatory.

The decree is lacking in all the elements required by the statute existing at the death of Mark Hopkins, in addition it shows on its face that it did not even distribute all the property in the hands of the administrator, viz., \$816.00 cash.

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#### **LACHES.**

Laches does not apply to a void judgment.

*Thayer v. Village of Downers Grove*, 16 N. E.  
(2d) 715 at 719.



Appellees assert that it appears from the Bill of Complaint that the causes of complaint are stale and that Plaintiffs and their ancestors have been guilty of gross laches. (Appellees' Brief, page 5, sub-paragraph 2 and page 38 et seq.)

Appellants discussed this subject in their opening brief at pages 9 to 15 inclusive, and cited authorities which establish that the doctrine of laches has no application to the facts alleged in the various causes of action in Plaintiffs' complaint, and we will not repeat here what has been said in Appellants' opening brief. However, we desire to call the Court's attention to additional authorities on this subject.

In

*Nichols v. Superior Court*, 28 Pac. (2d) 714  
(Cal.),

the Court there said:

“Even as to laches, the rule, as expressed in 15 California Jurisprudence 57, is that it has no application to an attack upon a judgment void for lack of jurisdiction. And in 15 Ruling Case Law, at page 694, may be found the declaration that ‘if the judgment is void on its face, it is usually held that no limitation can with propriety be interposed, for the reason that no amount of acquiescence can make such a judgment valid’ ”.

In *Black on Judgments*, Section 355, it is said:

“If a judgment is absolutely void, and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not.”



Plaintiffs have alleged facts in the Causes of Action grounded on fraud showing that they have used due diligence and are not guilty of laches: See Complaint, Record pp. 23, 24 and 25; paragraph 19 of Complaint sub-section "M", last two paragraphs, R. pp. 19 and 20, 21 and 22.

Appellants do not question the rule stated by Appellees that

"when the action is grounded on fraud, the Plaintiff must in his Complaint allege facts showing that he has used due diligence",

but Plaintiffs contend that in the allegations just above numbered they have fully complied with this rule.

Appellees' statement that this rule was applied by this Court in affirming the dismissal of another bill "involving the same estate and substantially the same allegations of fraud as set forth here", is not true in so far as it states that the other bill involved the same estate and substantially the same allegations of fraud as set forth here, citing *Freeman v. Hopkins*, 32 Fed. (2d) 756. We have heretofore in this brief pointed out and distinguished the facts alleged and the property involved in the case at bar are different and distinct, and do not affect the same parties and the same property as were involved in the *Freeman* case; and that the allegations of the Complaint in the *Freeman* case fail to show that the predecessors of these Plaintiffs did not know the facts constituting the fraud or were not present at the hearing, which can not be said of the complaint in this action.

Appellees have quoted *Del Campo v. Camarillo*, 154 Cal. 647 at p. 657, in which it is said

“they must clearly show that they did not discover the existence or commission of the alleged fraud until within a reasonable time before the action was begun, that they proceed promptly upon such discovery, and that their failure to make the discovery sooner was not due to their lack of diligence. All of this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery and which constitute the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds.”

Also quoting from 10 *Cal. Jur.* 55 to the same effect.

We have quoted this citation from Appellees' brief for the purpose of showing that the allegations in Plaintiffs' Complaint fully comply with every requirement therein demanded. (See R. pp. 19, 20, 21, 22, 23, 24 and 25, 29.)

Appellees contend that the statement at the end of paragraph 26 of the Complaint, viz.,

“Mere facts were not discovered by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them until September, 1945”

is not explicit and is not an allegation of the time the facts alleged in the Complaint constituting the fraud were discovered. How much more explicit could this allegation of the time when the fraud was discovered be made? It states positively that these facts (referring to the facts above stated) were not discovered

by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them, until September 1945. (R. p. 24.)

We have hereinabove referred to the sections of the Complaint and the pages of the record which contain a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery including also a statement of all facts previously known to Plaintiffs tending to indicate the existence of fraud.

Appellees on page 42 of their brief paragraph 5, state:

“In paragraph 29 of the Complaint it is alleged that in 1945 Plaintiffs by chance and after long research discovered the record of two deeds, one in Sacramento County and one in San Joaquin County. What the significance of these deeds may be is not disclosed.”

The significance of these deeds is:

1. To show that one of the most gigantic frauds in history was perpetrated as a result of the conspiracy between Moses Hopkins, Samuel Hopkins, and Mary Frances Sherwood Hopkins by which the heirs of Mark Hopkins, other than Moses Hopkins, were deprived of their rightful inheritance.

2. To show that the rightful heirs and their descendants, the Plaintiffs herein, are the owners of  $\frac{7}{8}$  of the interest of the estate of Mark Hopkins in said real property described in said deeds, but are deprived of the possession and use thereof as the result of the

conspiracy concocted and carried out by Moses Hopkins, Samuel Hopkins and Mary Frances Sherwood Hopkins. (R. Section 48, p. 35; Sections 49 and 50, pp. 36, 37; Section 36, pp. 28, 29; Section 43, pp. 33, 34.)

Referring to page 43 of Appellees' brief relating to the affidavits filed with their motions to dismiss and the documents attached thereto referred to as "speaking" motions, we fully covered this point in our opening brief, commencing with figure 1 on page 6, to figure 2 on page 9 thereof, and we will not unnecessarily repeat the same.

The case of *Ellis v. Stevens*, 37 Fed. Supp. 488 at 490 does not support Appellees' contention that affidavits may be used as a matter of defense to the merits upon a motion to dismiss. The Court in case cited by Appellees above states: "I can agree that the allegations of the Complaint, so far as they go, must be taken as true." On the contrary, it holds as Appellants contended at the hearing of the motion, that a motion to dismiss is in the nature of a demurrer to the Complaint, the allegations of which for the purpose of the motion must be taken as true.

Neither does the case of *Gallup v. Caldwell*, 120 Fed. (2d) 90, which was a suit by stockholder against a corporation. In that case, the question determined was purely a question of law, viz.: Whether under the allegations of the complaint, to be a stockholder of the corporation it was necessary for her ownership of the stock to be registered on the books of the corporation at the time suit was instituted. The Court



held that "if record ownership is a pre-requisite to the right to bring this action, then it is expedient that the point be decided preliminarily." The decision of the District Court in that case as shown by Appellees' brief was reversed.

Appellees also quote on page 47 of their brief, from *National, etc., v. Montgomery*, 144 Fed. (2d) 528, where defendants' affidavits offered in evidence were not contradicted and their motion was denied. On appeal the United States Court of Appeals for the District of Columbia stated:

"Even if the Complaint had stated a sufficient claim the uncontradicted affidavits of the defendants would have shown that there was no genuine issue as to any material fact."

In the case before the Court, Appellants filed affidavits contradicting the affidavits of the defendants on all material allegations in the affidavit of the defendants except that portion which referred to the earthquake and fire which occurred in San Francisco in 1906 and the loss of the public records therein. The affidavits filed by Appellants in contradiction of the affidavits filed by the Appellees raised issues of fact on the material matters alleged in the Complaint. Under the established rule as shown in Appellants' opening brief, the motion to dismiss should have been denied.



## STATUTES OF LIMITATION.

Referring to page 48 et seq. of Appellees' brief wherein they cite Subdivision 4 of Section 338, Code of Civil Procedure of California, we have no dispute with Appellees as to the law stated under that heading. As herein shown, Appellants have conformed to and abided by all the rules and statutes quoted in said subdivision. However, we do direct the Court's attention to the fact that said statute does not run against a void judgment or instrument; and in an action based upon fraud, the statute does not run until three years after discovery.

Section 319, California Code of Civil Procedure, referred to by Appellees on pages 48 and 51 of their brief, has no application to the facts alleged in Appellants' complaint, for the reasons:

1. That the statute of limitations is a defensive matter and must be pleaded in the answer and cannot be raised by demurrer or by motion to dismiss unless it appears from the face of the Complaint that the action is barred by the statute pleaded.

2. Plaintiffs in paragraph 46 of their Second Cause of Action (R. p. 34) allege

"That the heirs of Mark Hopkins as herein alleged are the lineal descendents, are the owners of  $\frac{1}{5}$  interest in and to said real estate and are tenants in common with said defendants, that Plaintiffs are the lineal descendents of the heirs of Mark Hopkins as set forth in their First Cause of Action herein."

And in their Third Cause of Action, paragraph 52 of Plaintiffs' Complaint (R. 39), after describing the property, allege:

“That upon the death of said Mark Hopkins, said brothers and sisters of said decedent succeeded to said real property as tenants in common thereof. That Plaintiffs herein are the owners as tenants in common of  $\frac{7}{8}$  interest in and to said real property above described. That in the probate proceedings had upon the estate of said Mark Hopkins, deceased, said Mary Frances Sherwood Hopkins and Moses Hopkins suppressed and concealed said property, and in the purported decree of distribution of said estate no reference is made to nor is there any record of said real or personal property herein referred to, nor to said deed herein above set forth, although the existence of said property was at all times herein mentioned, well known to said Moses Hopkins and Mary Frances Sherwood Hopkins.

That defendants as heretofore designated as being in the possession of said property owned  $\frac{1}{8}$  interest in said property and hold a  $\frac{7}{8}$  interest therein as tenants in common with Plaintiffs.”

Section 321 of the California Code of Civil Procedure in force since 1872 is as follows:

*“Possession, When Presumed Occupation Deemed Under Legal Title, Unless Adverse.* In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action.”

“The exclusive occupancy by a co-tenant is deemed permissive. It does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the co-tenant is hostile to him.”

*West v. Evans*, 175 Pac. (2d) 219 at p. 221,  
29 Cal. (2d) 414;

*Faubel v. McFarland*, 144 Cal. 717, 78 Pac. 261.

“The recordation of a deed purporting to convey the entire property in land to a tenant in possession is not, as a matter of law and independent of any other fact, notice to his cotenant of the adverse character of the grantee’s possession.”

*West v. Evans* (supra) at page 221.

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#### JURISDICTION OF THE FEDERAL COURT.

The Complaint states a Claim within the jurisdiction of the U. S. District Court.

Appellees contend that the District Courts of the United States are without jurisdiction over probate matters. They apparently concede that the U. S. District Court has jurisdiction to determine all other questions raised by plaintiffs’ complaint. (Appellees’ Brief, p. 51, et seq.)

This is a suit of a civil nature in equity between citizens of different states of which District Courts are given jurisdiction (28 U. S. Code, Chapter 2, Section 41 (1) of the Judicial Code).

Appellants concede that a Federal Court has no jurisdiction to probate a will or administer an estate; and neither the complaint nor the prayer thereof in this action asks the District Court to probate a will or administer an estate. But Federal Courts have equity jurisdiction to entertain suits in favor of legatees and heirs and creditors and other claimants against a decedent's estate to establish their claims so long as the Federal Court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the State Court. The complaint shows that there is no property in the custody of the probate court.

*Markham v. Allen*, 66 Supreme Court Reporter 296; 156 Fed. (2d) 653.

*Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43, 30 S. Ct. 10, 12, 54 L. Ed. 80, and cases cited. See *Sutton v. English*, supra, 246 U.S. 205, 38 S. Ct. 256, 62 L. Ed. 664; *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477, 56 S. Ct. 343, 347, 80 L. Ed. 331; *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 619, 56 S. Ct. 600, 602, 80 L. Ed. 920; *United States v. Klein*, 303 U.S. 276, 58 S. Ct. 536, 82 L. Ed. 840; *Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S. Ct. 275, 280, 83 L. Ed. 285.

While a Federal Court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in



such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Commonwealth Trust Co. v. Bradford*, *supra*, 297 U.S. 619, 56 S. Ct. 602, 80 L. Ed. 920; *United States v. Klein*, *supra*, 303 U.S. 281, 58 S. Ct. 538, 82 L. Ed. 840, *Markham v. Allen*, 66 Supreme Court Reporter 296; 156 Fed. (2d) 653.

The Complaint in this action at paragraph 35 (R. p. 27) shows that on the 27th day of January, 1947, upon a petition for letters of administration upon the estate of Mark Hopkins, deceased, duly filed in the Superior Court of the State of California, in and for the City and County of San Francisco, the same being the Court having jurisdiction of said estate, refused to appoint J. T. Blount, a person duly qualified, to act as such administrator, after notice given as provided by law; and that said office of administrator of said estate is now vacant, and that there is no personal representative of said estate to bring this action.

The effect of the judgment prayed for in this action, viz., that portion of the prayer asking the District Court to direct the probate Court of the City and County of San Francisco to appoint an administrator, would be to leave undisturbed the orderly administration of Mark Hopkins' estate and to decree plaintiffs' rights in the property to be distributed after its administration. This would not be an exercise of probate jurisdiction or an interference



with property in the possession or custody of a state Court.

The mere fact that the district Court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. *Meredith v. Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9. *Markham v. Allen*, *supra*.

The prayer also prays for a judgment of the District Court decreeing

B. That the purported decree of distribution in the estate of Mark Hopkins, deceased, herein set out in full, made on the first day of November, 1883, was obtained by extrinsic fraud practiced upon the Court and the heirs of Mark Hopkins, deceased, and for the reasons set forth in paragraph 19 of plaintiffs' First Cause of Action, and that said decree of distribution is null and void.

C. That the property described in plaintiffs' complaint and not mentioned or described in said purported decree of distribution was at all times during said administration of said estate of Mark Hopkins, and at the time of the rendition of said decree of distribution known to said administrator, and that the title to said property so known to said administrator Moses Hopkins and not described in said purported final account and decree of distribution did not pass to the distributees named in said purported decree of distribution, but remained a part of the estate of Mark Hopkins undistributed.

D. If this Court should find that the said decree of distribution was and is valid and in full

force and effect, then that this Court find and declare that the title to the property herein described, known to said administrator at the time of the making of said decree of distribution, but not set forth, mentioned or described therein, did not pass to the distributees named Moses Hopkins and Mary Frances Sherwood-Hopkins, or to either of them, by reason of that part of said decree purporting to distribute to said Moses Hopkins and Mary Francis Sherwood-Hopkins, "all property not now known or hereafter discovered."

E. That the Court declare and decree that the title to the property known to said administrator Moses Hopkins at the time of the entering of said decree of distribution was vested  $7/8$  or such interest as the record may disclose in the plaintiffs the heirs of Mark Hopkins, deceased, subject to administration.

F. That the Court direct the Superior Court of the State of California in and for the City and County of San Francisco, sitting in probate, to appoint an administrator, *de bonis non*, and to distribute the said property herein described and any other property hereinafter discovered, pursuant to the findings and judgment of this Court, to the persons determined by this Court to be the heirs of Mark Hopkins, deceased.

G. For such other relief as the Court may deem meet and equitable in the premises.

This action, therefore, being one of which the Court has jurisdiction in equity, even though the Court determines that it does not have jurisdiction to grant all the relief prayed for in plaintiffs' complaint (R.

pp. 46 to 48, inc.), then under the provision of subdivision "G" praying for such other relief as the Court may deem meet and equitable in the premises then the Court may grant such relief to which, as under all the circumstances, the complaint shows the plaintiffs are entitled.

Equity having once obtained jurisdiction of a cause, will dispose of the entire controversy under the two maxims, that "equity will not deal with a case by piecemeal" and "equity delights to do justice, and not by halves." The fact that legal questions are presented for consideration is no objection to entertaining jurisdiction of an action if the controversy be one in which a Court of equity only can afford the full relief prayed for.

*Horan v. Consolidated, etc. Min. Co.*, 41 Cal. App. 333; 182 Pac. 813. In an action for rescission of a contract and restoration of the property sold the Court may award a money judgment for the value of the property, though not asked for by the plaintiff. *Swan v. Talbot*, 152 Cal. 142; 94 Pac. 238.

10 *Cal. Jur.*, 946, Sec. 41.

Where title to property is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive, equity, as handmaid of the law, will disregard mere forms and ascertain and act upon the substance of things. Devious and intricate methods may be employed, but the mind-searching, far-reaching vision of equity cannot be obscured by any pretense, however ingenious, subtle, or specious it may be.

Equity abhors fraud in all its guises, and renders abortive its shrewdest intrigues and machinations.

*Sanguinetti v. Rossen*, 12 Cal. App. 623; 107 Pac. 560, 562.

We respectfully submit that the judgment dismissing this action should be reversed and the cause remanded to the District Court with instructions to deny Appellees' motion to dismiss.

Dated, San Francisco, California,  
November 15, 1948.

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